Conversations For Workable Government

REPORT #227, JUNE 2015

LITTLE HOOVER COMMISSION

DEDICATED TO PROMOTING ECONOMY AND EFFICIENCY IN CALIFORNIA STATE GOVERNMENT

To Promote Economy and Efficiency

The Little Hoover Commission, formally known as the Milton Marks "Little Hoover" Commission on California State Government Organization and Economy, is an independent state oversight agency.

By statute, the Commission is a bipartisan board composed of five public members appointed by the governor, four public members appointed by the Legislature, two senators and two assemblymembers.

In creating the Commission in 1962, the Legislature declared its purpose:

...to secure assistance for the Governor and itself in promoting economy, efficiency and improved services in the transaction of the public business in the various departments, agencies and instrumentalities of the executive branch of the state government, and in making the operation of all state departments, agencies and instrumentalities, and all expenditures of public funds, more directly responsive to the wishes of the people as expressed by their elected representatives...

The Commission fulfills this charge by listening to the public, consulting with the experts and conferring with the wise. In the course of its investigations, the Commission typically empanels advisory committees, conducts public hearings and visits government operations in action.

Its conclusions are submitted to the Governor and the Legislature for their consideration. Recommendations often take the form of legislation, which the Commission supports through the legislative process.

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State of California

LITTLE HOOVER COMMISSION

June 25, 2015

The Honorable Kevin de León
President pro Tempore of the Senate
and members of the Senate

The Honorable Bob Huff
Senate Minority Leader

The Honorable Toni G. Atkins
Speaker of the Assembly
and members of the Assembly

The Honorable Kristin Olsen
Assembly Minority Leader

Dear Governor and Members of the Legislature:

First among the fundamental planks of clean, open government in a complex society such as California are transparency laws that balance the public's right to observe and participate in government with officials' need to effectively administer it. In the past that balance could often tilt toward excessive secrecy. But today's Californians have powerful access to government and strong rights to watch and weigh in on deliberations that shape decisions and policy.

Still, the state's transparency laws need fine-tuning. The Commission urges the Legislature and Governor to reconsider the statutory language of California's Bagley-Keene Open Meeting Act for state government and the Ralph M. Brown Act for local government. Specifically, the Commission recommends minor adjustments to the statutes to provide state and local appointed and elected officials more ability to discuss general policy issues among themselves outside of public meetings – while continuing to prevent them from reaching agreement on votes or decisions. California's open meeting acts, first enacted in 1953, are well-intentioned and fiercely defended. But some now argue – and the Commission agrees – that unfortunate side effects of altering these laws in recent years hinders a modern, administrative state's ability to govern itself effectively.

Simultaneously, the Commission recommends retaining and enforcing the varied ex parte policies regarding private conversations held between public officials in the executive branch of state government and those who try to influence them. The Commission opposes moves to ban these private so-called ex parte conversations – campaigns driven by allegations of improper conversations between the California Public Utilities Commission and the utilities it regulates. It suggests, however, that agencies consider whether additional transparency and accountability measures may be helpful to provide Californians greater insight into state government decision-making.

For 10 months the Little Hoover Commission has examined the unforeseen impacts of changing the Brown Act for local government in 2008 and incorporating the changes in 2009 to the Bagley-Keene Open Meeting Act for state government. The actions were sponsored with commendable intent by media and First Amendment interests in the wake of a confusing 2006 state appeals court ruling.

But Commissioners have learned that the changes prompted a new uncertainty among elected and appointed state and local officials and their staffs regarding their rights to discuss general policy issues with their colleagues away from the meeting room lights and microphones.

The Commission, indeed, heard that fears of stepping over the line into open meeting act violations are so pervasive that thousands of the most important decisions in California are made under conditions in which elected and appointed officials serving together seldom talk to one other outside public meetings. More troubling, witnesses said, as officials are constrained in their ability to gather information and candidly bounce general policy ideas off one another and educate themselves, the quality of public decision-making has eroded.

In the view of the Little Hoover Commission, the sustained powerful campaigns of media and First Amendment interests to ensure public access to government proceedings is not working as intended, and may be, at worst, backfiring. Decision-makers and stakeholders alike told the Commission that due to limits on informal discussions among elected and appointed bodies, California government also is becoming less transparent, not more, as decision-making is increasingly driven down, and out of public sight, to government staffers who are not accountable to the voters in elections. Lobbyists and other third parties who recognize the restraints on decision-makers also can skillfully pollinate decision-making bodies with individual conversations to subtly and privately steer them toward consensus.

Throughout the study process, the California Newspaper Publishers Association and others have told the Commission the state's open meeting acts aren't the problem and have singled out government attorneys for interpreting them too narrowly. The Commission learned that attorneys for state boards, commissions, city councils, special districts, school boards and other entities do often counsel their clients against informal conversations. But their reasoning also rings true. Silence away from the microphones is an effective tool to avoid open meeting act lawsuits, which can serve as an entry point for opponents to overturn controversial multibillion-dollar projects and unwind difficult compromises.

The Little Hoover Commission has long been guided in its work by principles of open government and the public interest. It appreciates the reasoning of First Amendment advocates in proposing tougher open meeting laws and public concerns about whether they can trust their leaders outside public meetings. But it believes just as strongly that elected and appointed officials have a duty to act with efficiency and clarity as they govern California through the complexities and extreme challenges of its modern existence. The Commission contends that recent ex parte abuses, potentially criminal in nature, represent deviations from the law, rather than the norm, and that respective agencies can evaluate additional measures to improve transparency and accountability. It also contends that restrictions placed on officials by the current open meeting laws are impeding quality decision-making and should be eased with minor modifications. The Commission respectfully submits these findings and recommendations and is prepared to help you take on this challenge.

Sincerely,

Pedro Nava
Chairman

CONVERSATIONS FOR WORKABLE GOVERNMENT

Table of Contents

Table of Sidebars & Charts

Executive Summary

The perils of the hurried, often-heated atmosphere in which the Legislature proposes, debates and finally decides the fate of thousands of bills annually includes well-intended change that creates unintended consequences. Legislation can unexpectedly miss its mark when those who interpret and implement it respond differently than sponsors anticipated.

So it is with California's open meeting laws. With the best of civic intentions they are stifling the ability of the state's public officials to govern effectively. They are due for reconsideration.

The Little Hoover Commission, in a 10-month review, has examined compliance issues with California's two primary open meeting laws, the Bagley-Keene Open Meeting Act for state government and the Ralph M. Brown Act for local government. The Commission focused on the unexpected impacts of reforming the Brown Act in 2008 and incorporating those changes in 2009 into the Bagley-Keene Act. The enacted reforms, sponsored by the California Newspaper Publishers Association, attempted to resolve a confusing 2006 state appeals court ruling related to open meetings. Specifically, the reforms aimed to altogether ban serial meetings (in which Commissioner A conveys a view privately to Commission B who conveys it to Commissioner C to reach a majority consensus) by ensuring that a majority of an entity's members cannot communicate via any means outside a noticed meeting to discuss, deliberate or take action on a matter under their jurisdiction.

These reforms resolved the ambiguity created by the 2006 court ruling. But the additional language has created a surprising consequence – less government transparency. Constraints on internal discussions by appointees and elected officials have driven more decision-making downward to the staff level and out of sight of the public. Many participants in the Commission's study process said staffers who are not accountable to the public in elections or through the appointments process are gathering more consensus and making decisions internally for leaders to ratify in public meetings. More troubling, lobbyists who understand the constraints faced by decision-makers can use conversations with individual office holders to subtly nudge them toward consensus for their own ends.

The Commission learned that public sector attorneys have urged such an abundance of caution as a result of the changes that many elected and appointed officials fear talking with one another outside public meetings. An exploration of these developments and recommendations to resolve them with a small adjustment of statutory language is at the heart of this report.

The Commission also examined the everyday use of private conversations in the executive branch between government officials and the interests they regulate. These so-called "ex parte communications" have become a significant concern during the past year, driven by allegations that some officials at the California Public Utilities Commission held unreported and illegal private conversations with the utilities they regulate.

During its study process the Commission considered whether private conversations between regulators and the regulated are appropriate. It examined the array of rules employed by various agencies throughout state government and also reviewed policies used by the federal government. The Commission concluded that these private conversations are, in most cases, a necessary and effective tool of information gathering and governing – and recommends that current rules stay in place, while giving consideration to additional transparency and accountability that could provide Californians optimum insight into state government decision-making.

Drawing the Line

Tensions over where to draw the line on private conversations within an open government are central to a democratic society. A state regulatory official's ability to meet privately with lobbyists or a county supervisor's wish to discuss general policy issues informally with colleagues can be another person's definition of secret government. The 2008 and 2009 reforms to the Brown and Bagley-Keene acts tried admirably to find a best way forward. But they created unforeseen governing problems that require fixing for the good of Californians.

The Commission frequently heard during its review that changes made to the state's open meeting acts have confused appointed and elected officials regarding what they are allowed to do outside public meetings – and more importantly, what they can't do. Media interests and other supporters of tough open meeting act laws simultaneously contended to the Commission that the confusion is unnecessary, the laws do not need to be fixed and that government attorneys are simply interpreting them incorrectly.

But the legal muddle and overflow of caution inside the public sector is obviously real and having a corrosive impact on public decision-making. Elected and appointed officials throughout California told the Commission they feel obstructed in efforts to gather quality information and make the best possible decisions for those whom they represent. Many who serve on state boards and commissions or on city councils and boards of school districts and special districts, say they so fear violating the state's open meeting acts and dragging their entity into lawsuits that they are afraid to talk privately about even the most general matters with their colleagues or be seen together at events outside of public meetings. Their government attorneys, perpetually on the watch against open meeting act legal challenges that could endanger or overturn multimillion-dollar decisions or hard-fought compromises, interpret open meeting laws conservatively and advise officials to exercise maximum caution.

As a result, officials are cautious. Many are frequently in the dark about what their colleagues are thinking. They sit behind their microphones in public, often unwilling to engage in frank and robust discussions necessary to reach good compromises. Several told the Commission privately and in public settings that they fear saying something off-base or naïve that invites ridicule or provides fodder for political opponents to use against them.

Californians, who live in a landscape of great complexity and hard public choices, who endure the many consequences of poorly-informed decisions, deserve better than this. Many legal experts and stakeholders believe it would take no more than a few clarifying words in the state's open meeting laws to better balance the public's right to observe and participate in their government with officials' need to govern. The Little Hoover Commission agrees with them.

Meanwhile, the Commission also heard disturbing accounts from city councilmembers and members of other public bodies about a secondary issue related to the Brown Act – an inability to curb abusive public comment at open meetings. Officeholders described how the same band of commenters faithfully shows up at televised council meetings, particularly in the City of Los Angeles, to heckle them, curse, sing, talk in funny voices, dress in offensive or outrageous costumes and make comments only slightly related to the agenda topic. Commissioners heard that attempts to rein in this abusive and time-wasting behavior has primarily resulted in lawsuits and the necessity to pay public funds to these commenters. Elected officials told the Commission that neither the Legislature, nor the courts, tolerate such behavior.

The Commission, long guided in its studies by principles of accountability, transparency and advancing the public interest, believes wholeheartedly in open government and the public's right to access it. In that spirit, it recommends a small adjustment to each of California's open meeting acts to provide state and local officials more ability to discuss general policy issues among themselves outside of public meetings – while continuing to prevent them from reaching agreement on future votes or decisions. The Commission, likewise, recommends a fresh look at ways to curb abusive use of public comment opportunities.

In light of the widespread interest and concerns throughout California about open government at the state level, the Commission also offers recommendations to enhance public access to executive branch, board and commission deliberations while ensuring that those who govern can do so effectively.

Recommendation 1: The Legislature should adopt new language to various state government codes to clarify that appointed officials of state boards and commissions can hold informal internal discussions among two or more members about general policy issues related to their work so long as the discussions are not used to develop concurrence or consensus on an upcoming vote or decision in violation of the Bagley-Keene Open Meeting Act.

Recommendation 2: The Legislature should adopt new language to various state government codes to clarify that local elected officials and their appointees to local and regional government bodies can hold informal internal discussions among two or more members about general policy issues related to their work so long as the discussions are not used to develop concurrence or consensus on an upcoming vote or decision in violation of the Ralph M. Brown Act.

Recommendation 3: A working group led by trade associations such as the League of California Cities, California State Association of Counties, California Special Districts Association and California School Boards Association should consider a fresh legal approach to maintaining decorum and policing public comment during open meetings – in line with that employed by the Legislature – that will help rein in abuses by some members of the public.

Recommendation 4: The State of California should retain all existing executive branch policies that ban ex parte communications in adjudicatory proceedings. The state also should retain its current array of ex parte policies that provide useful information to executive branch decision-makers and govern a variety of quasi-legislative proceedings, quasi-judicial proceedings and a variety of hybrid proceedings with consideration as to additional transparency and accountability.

Reconsidering California's Open Meeting Laws

Among the countless thousands of bills signed by California governors in the past six decades, two in particular still resonate in the everyday work of state and local government. The foundational Bagley-Keene Open Meeting Act for state agencies signed by Governor Ronald Reagan in 1967 – and its predecessor Ralph M. Brown Act for local government signed by Governor Earl Warren in 1953 – endure in California's civic life by broadening the public's right to be inside the room, observe and participate as elected and appointed officials deliberate and make decisions.

The anti-secrecy principles embedded within these acts have long served their advocates as rallying calls for open government throughout California. The acts provide a legal foundation for media organizations and individual Californians to compel open deliberations and public decision-making with audiences participating. The state's two primary open meeting acts, aggressively expanded and vigorously defended over the years by media interests and public watchdogs, have become powerful tools for monitoring the conduct of government officials.

Some Californians now believe, however, the long, relentless crusade for open government has overreached and begun to obstruct good government. Specifically, these public officials and stakeholders cite unforeseen and detrimental impacts for effective governing as a result of enacted legislative amendments to the Bagley-Keene Act in 2009 and near-identical amendments made to the Brown Act in 2008. The amendments, made to rectify a confusing state appeals court ruling, have instead created more confusion and caused some public agencies to be "tied up in knots," according to one Commission witness.

During a series of hearings and meetings during 2014 and 2015, government officials and others told the Little Hoover Commission that the quality of public decision-making is faltering at some state boards, commissions and agencies, as well as at city halls and county courthouses, as a result of these amendments. Witnesses specifically cited new constraints on officials' ability to talk with one another outside of public meetings. Previous to the 2009 and 2008 changes, decision-makers believed they could talk with one another informally about

> ***"The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."***
>
> Preamble, Ralph M. Brown Act. Enacted 1953. Also, Bagley-Keene Open Meeting Act. Enacted 1967 and amended in 1980, 1981, 2001 and 2009.

general policy issues related to their work, even as a majority, provided they did not attempt to reach consensus on a future action or vote. After the changes, many believed, due to legal interpretations from their government attorneys, that discussing or trying to learn about general policies among themselves risked violating the acts.

Many witnesses and participants in the Commission's study process said the 2009 and 2008 changes have left California's elected and appointed officials to grapple with the complexities of a modern state while barely talking with one another outside public meetings.

During a 10-month review of the state's open meeting laws, the Commission repeatedly heard this concern at the juncture of the peoples' right to know and officials need to govern. Many among more than 30 hearing and advisory committee participants, as well as nearly 300 local elected officials surveyed anonymously across California, expressed alarm about the impacts of open meeting laws on their ability to effectively run state boards and commissions and local governments. While all professed support for open government, many participants in the Commission's study process said 2009 and 2008 changes to the state's open meeting acts and their attorneys' interpretations of those changes have significantly hindered their information-gathering ability and greatly complicated decision-making processes.

"I get the need for transparency. But the way the Brown Act is being interpreted – or is written – it can have a stifling effect on conversation," said Los Angeles City Councilmember Robert Blumenfield during a May 2015 commission advisory committee meeting.

"Today, as I read the law, it would be a violation of Bagley-Keene for me to ask two of my colleagues, 'What do you think about the future of solar energy?' even though I could ask that question of any other person on the planet," CPUC Commissioner Mike Florio testified before the Commission at its August 2014 hearing. "That seems unduly restrictive and counter-productive to me."

Given the stature of open, deliberative government in a democracy, the Commission does not take lightly the implications of loosening the state's open meeting laws, as suggested by hearing witnesses and meeting participants. Like other Californians, Commissioners are concerned over media reports in 2014 and 2015 of alleged improper communications between the California Public Utilities Commission (CPUC) and executives of investor-owned utilities. Although these alleged incidents might be characterized as not following rules that already exist – as opposed to the need for stronger rules – the intensity of media coverage is mindful of historic concerns about government secrecy that ebb and

flow with the headlines. A 1952 San Francisco Chronicle reporting series, for instance – "Your Secret Government" – detailed how Bay Area government agencies routinely barred reporters and other Californians from attending public meetings. The series prompted the League of California Cities and California Newspaper Publishers Association to jointly draft and win legislative support for the Brown Act.[1]

During its review of open meeting laws, the Commission read near-daily newspaper stories and broadcast reports alleging Bagley-Keene and Brown Act violations throughout California. Attesting to the acts' influence in civic life, public watchdogs and the media are quick to raise alarms over possible, and sometimes even seemingly minor, violations.[2] Not infrequently, follow-up stories report on the courts and county prosecutors clearing government entities in Brown Act cases considered groundless or too close to call.[3] It is clear from this abundance of media reports that violations are occurring and perhaps common, but some local elected officials contended to the Commission that some opponents and interest groups can wield Brown Act allegations as a tool of political harassment. In its research, the Commission also saw occasional parallels between the use of Bagley-Keene Act and California Environmental Quality Act (CEQA) lawsuits as a tactic to delay projects or leverage concessions. Lawsuits aiming to block California's high speed rail system and proposed Delta bypass tunnels, for instance, alleged violations of the Bagley-Keene Open Meeting Act alongside alleged violations of CEQA.[4]

William T. Bagley: Make The Law "A Little More Manageable"

"The original section 11123 of the 1967 act was as follows: 'All meetings of a state agency shall be open and public and all persons shall be permitted to attend any meeting.' That's all it said. It had nothing to do with if you could meet and confer and do anything else."

"Obviously, the immediate problem is the words' to discuss.' It's much too broad and ought to be changed."

"It (the act) should be a little more tolerable, a little more manageable, a little more equitable to making public policy. Making public policy is what it's all about."

Source: Former-Assemblymember William T. Bagley, author of the 1967 open meeting act for state government, later known as the Bagley-Keene Open Meeting Act. June 25, 2015, telephone conversation, with the Little Hoover Commission.

Numerous times over the course of its study, the Commission heard that the 2009 changes to the Bagley-Keene Act and 2008 changes to the Brown Act contribute to the ease of these allegations, and aren't working as their sponsors and authors intended. Many officials on the front lines of state and local governing told the Commission that the changes have

produced less government transparency instead of more. Officials commonly noted that due to their perceived inability to talk informally with one another outside public meetings, decisions are less informed than they would like or made at the staff level, out of public view for elected and appointed officials to simply ratify at their open meetings.

This introductory chapter, in keeping with the Commission's statutory mission to seek efficiency and economy within the state's executive branch, describes first the Commission's review and findings related to the Bagley-Keene Open Meeting Act as it applies to state agencies, boards and commissions. It then describes similar findings related to the Brown Act as it impacts city and county governments, special districts, school boards and other entities.

Origins of the Commission's California Open Meeting Acts Study

The Commission learned initially about concerns with the state's Bagley-Keene Open Meeting Act in an unexpected venue. The Commission's April 24, 2014, hearing on energy governance as a follow-up to the Commission's 2012 study, *Rewiring California: Integrating Agendas for Energy Reform,* sparked the inquiry. During the hearing, one witness from the energy sector pivoted from the main point of his testimony to suggest that changes enacted to the Bagley-Keene Act in 2009 are stifling the CPUC – a San Francisco-based state agency with five full-time board members and 1,000 staffers – as it attempts to regulate privately-owned electric, natural gas, telecommunications, water, railroad, rail transit and passenger transportation companies.

The five CPUC board members have largely stopped talking with one another about issues on their collective agenda, the Commission learned. As a result of the Bagley-Keene Act changes, few informal discussions precede the public meetings where board members make multibillion-dollar decisions about some of California's most complex matters. Indeed, the Commission was told in 2014 that most CPUC board members spent little time at the office – because they couldn't talk with one another there, even informally about general policy issues.

The April 2014 hearing witnesses singled out the two small words – "to discuss" – in the 2009 legislative language as the cause of this change. They told the Commission the words infer legal risk for board members talking privately among themselves – especially if private conversations can be interpreted as helping them reach collective consensus on an issue.

"I yield to no one in my reverence to Bagley-Keene, but one amendment three years ago has done some real unintended damage and I encourage you to draw attention to it, and that is the constraint on the ability of individual commissioners (California Public Utility Commissioners) simply to talk to each other as part of a normal course of business," said Ralph Cavanagh, co-director of the energy program for the Natural Resources Defense Council. Two additional energy experts on the hearing panel quickly added their agreement. Unprompted, Mr. Cavanagh and the other April 2014 witnesses told the Commission the Bagley-Keene Act changes have stifled effective decision-making by limiting discussion among the Commission's board members, and similarly among their advisors. The witnesses pointed to the CPUC's enormous workloads and cited the "unproductive constraints" of the Bagley-Keene rules – or at least the CPUC's interpretation of those rules – in conducting its work. The three witnesses expressed consensus to the Commission that the difficult "process" of complying with the 2009 changes have essentially trumped quality policymaking at the CPUC. Witnesses told the Commission that adhering to the Bagley-Keene Act's requirements for transparency have become more important at the CPUC than having all the information and discussions necessary to make complex multibillion-dollar decisions.

"The underlying purpose behind the BK Act is to allow transparency to decisions as they are being made. The public (including the media) is able to see the debate or discussion, have some sense of the basis for the decision and to observe who voted which way."

Robert C. Fellmeth. Executive Director, Center for Public Interest Law. University of San Diego School of Law. August 26, 2014. Written testimony to the Commission.

It's Not About Efficiency: A Brief Introduction to the Bagley-Keene Act and its Origins in the Brown Act

The Bagley-Keene Open Meeting Act sets the rules for how multi-member state boards, commissions, panels, committees and councils conduct their decision-making in public. It requires, with specified exceptions, that all meetings of a state body be open and public and all persons be permitted to attend any meeting. Generally, according to the California Attorney General's Office, the Bagley-Keene Act "requires these bodies to publicly notice their meetings, prepare agendas, accept public testimony and conduct their meetings in public unless specifically authorized by the Act to meet in closed session."[5]

The current Bagley-Keene Act, which originated as AB 495 during the Legislature's 1967 session, is state government's equivalent of local government's Brown Act.

"Essentially the provisions of A.B. 495 provide a single open meeting law for state agencies that is similar to the Ralph M. Brown Act, which governs the meetings of local legislative bodies," wrote Assemblymember William T. Bagley in an August 15, 1967, letter to Governor Ronald Reagan, urging him to sign the bill. "The bill has enjoyed virtually

unanimous approval by the public media," the Assemblymember wrote the Governor.

Indeed, a similar August 14, 1967, letter to Governor Reagan from the California Newspaper Publishers Association (CNPA), voiced "strong support" for the measure and called it "the result of a lengthy effort to obtain a comprehensive open meeting statute." The CNPA noted that the bill "embodies the philosophy of the Brown Act," and pointed out that Governor Edmund G. (Pat) Brown had in 1965 declined to sign a similar bill by Assemblymember Milton Marks of San Francisco.

Governor Reagan signed the bill on September 2, 1967.

Perhaps most importantly for the purposes of this report, the Bagley-Keene Act has been interpreted to limit members of state boards and commissions – including those at the Little Hoover Commission – from conversing privately with more than one other member about agenda items or other business pending before the board or commission. Conversations with more than one other commissioner about issues outside public meetings are considered public meetings and are illegal without proper notice under the act. Elected or appointed members of boards are generally required to conduct conversations through an executive director who serves as a conduit to the entire board.

Also illegal are "serial meetings." This prevents situations on a five-member board in which Commissioner A conveys his or her views on an agenda item privately to Commissioner B who then conveys it privately to Commissioner C to formulate majority consensus for an eventual public vote. A 2004 California Attorney General's analysis of the Bagley-Keene Act acknowledges the apparent clumsiness of this arrangement and notes the frustrations that appointees to boards and commissions often have with the act.

"Operating under the requirements of the Act can sometimes be frustrating for both board members and staff," the legal analysis states. "This results from the lack of efficiency built into the Act and the unnatural communication patterns brought about by compliance with its rules."[6]

The Attorney General's analysis notes, however, that efficiency is not the priority in the operations of state boards and commissions.

> *"If efficiency were the top priority, the Legislature would create a department and then permit the department head to make decisions. However, when the Legislature creates a multi-member board, it makes a different value judgment.*

> *Rather than striving strictly for efficiency, it concludes that there is a higher value to having a group of individuals with a variety of experiences, backgrounds and viewpoints come together to develop a consensus. Consensus is developed through debate, deliberation and give and take. This process can sometimes take a long time and is very different in character than the individual decision-maker model."*

The Attorney General's analysis urges board members to take a larger view of the rules:

> *"If one accepts the philosophy behind the creation of a multi-member body and the reservation of a seat at the table for the public, many of the particular rules that exist in the Bagley-Keene Act become much easier to accept and understand. Simply put, some efficiency is sacrificed for the benefits of greater public participation in government."*

The Attorney General's Office also contends that appointed state board members and commissioners can talk with one another informally and with their staff – but not in a way that telegraphs or receives signals from other commissioners about intended actions in a later public meeting. However, while the Bagley-Keene Act clearly states that a majority of members of a state body shall not discuss, deliberate or take action outside a meeting, the rules become more complicated when a subcommittee or advisory committee of the full board meets, in particular, a large board. For these small subsets, the Attorney General advises two is a conversation and three is a meeting. As a result, most boards and commissions prohibit more than two members, even when two is not close a majority, to informally discuss policies under their jurisdiction or even to collectively gather information without making the gathering open to the public.

Legislative History of the Bagley-Keene Open Meeting Act

California's Bagley-Keene Open Meeting Act has its origins in the 1953 enactment of the "Brown Act," authored as Assembly Bill 339 by former Assembly Speaker Ralph M. Brown of Modesto, then chair of the Assembly Interim Committee on the Judiciary. Under the guidelines of the Brown Act signed by Governor Earl Warren, all meetings of local government legislative bodies must be open to the public.

Extending provisions to state agencies

In 1967, Assemblymember William T. Bagley of San Rafael extended provisions of the Brown Act to state agencies, boards and commissions with Assembly Bill 495, signed by Governor Ronald Reagan. The bill, with leading support from the California Newspaper Publishers Association, extended open meeting coverage to approximately 60 state entities. Assemblymember Bagley, in an August 15, 1967, letter to Governor Reagan, stated: "The bill provides a uniform set of rules for the conduct of meetings of all state agencies and provides, with certain exceptions, that all such meetings shall be open to the public. Essentially the provisions of AB 495 provides a single open meeting law for state agencies that is similar to the Ralph M. Brown Act, which governs the meeting of local legislative bodies."

New public rights to written materials

In 1980, Senator Barry Keene of Benicia authored Senate Bill 1850, the State Agency Open Meeting Act, to broaden public disclosure of public meetings. The bill, signed by Governor Jerry Brown, aimed to provide public access to written materials used by members of a board at public meetings. This bill also expanded the list of state entities under the state's open meeting law to include advisory committees, subcommittees and other bodies of state agencies and required one-week advance notice of meetings upon request. The goal of SB 1850 was to ensure public access to more government meetings, along with background information, agendas and other documents important to better understanding of the proceedings.

Extending provisions to state boards and commissions

In 1981, Senator Keene successfully carried Senate Bill 879, requiring state boards and commissions to follow the same strict emergency meeting rules as local government. With the signature of Governor Jerry Brown, the State Agency Open Meeting Act was renamed the Bagley-Keene Open Meeting Act. With few specified exceptions, it declares that all meetings of a state body are to be open and made public and all persons are permitted to attend.

Prohibiting collective concurrence via any method

In 2001, Assemblymember Joe Canciamilla authored AB 192, to prohibit any private use of direct communications, personal intermediaries or technological devices by a majority of board or commission members to develop collective concurrence on an action or a vote to be taken. The legislation, signed by Governor Gray Davis, conformed the Bagley-Keene Act to provisions already contained in the Brown Act.

New limits on discussions

In 2009, Assemblymember Mike Eng of Monterey Park, authored Assembly Bill 1847, which imposed new limits on conversations outside of public meetings by members of state boards and commissions. The bill, signed by Governor Arnold Schwarzenegger, has been widely interpreted by state government attorneys to prevent members from having internal or informal discussions about any items of business within the subject matter jurisdiction of their board or commission.

Sources: Bill files. Legislative Intent Service, INC. Summer 2011. "Engrossment." Woodland, CA. http://www.legintent.com/engrossment/summer2011.pdf.

Confusion in the Courts: Why the State's Open Meeting Acts Were Changed

Changes enacted by the Legislature to the Bagley-Keene Act in 2009 and the Brown Act in 2008 were rooted in a 2006 First District Court of Appeal interpretation of the Brown Act in *Wolfe v. City of Fremont.*[7] Many media interests considered the ruling to be a weakening of bans on serial meetings. At the very least, the court ruling created confusion within California government regarding the legal status of serial meetings, which were previously banned by both the Brown and Bagley-Keene acts.

The California Newspaper Publishers Association (CNPA) told the Commission at its August 26, 2014, hearing: "The court concluded that serial communications did not violate the Brown Act if a majority of members of the agency did not commit to an action to be taken."

The City of Fremont case involved a November 2004 policy by the police department to begin limiting responses to home invasion alarms. The facts showed that the city manager met individually with council members to explain the new policy and secure their collective agreement not to interfere. The council members also privately discussed the policy among themselves. Eventually, these communications became publicly known and spurred a city resident's lawsuit alleging violations of Brown Act requirements that council meetings be open and public. But a trial court rejected the allegations and the appeals court also ruled that the City of Fremont did not violate the Brown Act. The appeals court judge ruled that because the council ultimately didn't vote on the issue it had discussed privately it had not illegally reached any concurrence in advance.[8]

Senate Floor Analysis of AB 1494 (Eng) Proposing to Amend the Bagley-Keene Open Meeting Act (2009)

"According to the author's office, this bill is intended to close a loophole in the Bagley-Keene Act that allows for serial meetings to legally take place. The loophole stems from a 2006 California appellate court ruling in Wolfe v. City of Fremont (2006, 144 Cal. App. 4th 533) that declared a member who went to a majority of members in individual meetings to discuss a public issue did not violate that serial meetings provision, unless the communication actually resulted in a decision of the board. Attorneys for the newspapers and the public agencies agreed the decision effectively sanctioned unlimited serial meetings involving a majority so long as it could not be proven the body agreed to a specific action as a result of the communications.

The author's office notes that before Wolfe, violations of the serial meeting prohibition were becoming problematic to pursue because it was difficult to prove that secret communications were being carried out by a majority to develop a collective concurrence on a public issue. The author's office contends that without the solution provided by this bill, journalists and members of the public will have an impossible task of proving that the state board or commission reached a decision."

Source: AB 1494 (Eng) Senate Rules Committee analysis. June 4, 2009. Office of Senate Floor Analyses.
http://lisprdweblb.calegis.net:7010/LISWeb/faces/bills/bill_search_results.xhtml

In August 2014 testimony to the Commission, CNPA General Counsel Jim Ewert explained the rationale for introducing new open meeting act bills in response to the court ruling.

"Because a wide range of public and media attorneys believed the *Wolfe* court erred in its interpretation, many groups, including CNPA and the League of California Cities collaborated to sponsor legislation to ensure that a majority of a body's members could not use a series of communications outside a noticed meeting to discuss, deliberate, or take action on a matter under the body's jurisdiction under the Brown Act," he testified to the Commission. Essentially, the bills were a way to close loopholes that appeared, due to the court ruling, to legalize serial meetings in some cases.

Advocates led by the CNPA won passage in 2008 of AB 1732 (Romero) to amend the Brown Act and prohibit serial meetings altogether. A second CNPA-sponsored bill enacted in 2009, AB 1494 (Eng), synchronized the Bagley-Keene Act with the 2008 Brown Act changes. Governor Arnold Schwarzenegger signed both bills. Mr. Ewert said the bills eliminated legal language on which the *Wolfe* court had based its interpretation and expressed the Legislature's intent to reject the *Wolfe* decision.

At the time there were hints of the controversies that would attend the laws after their passage and during their implementation. In 2007, Governor Arnold Schwarzenegger vetoed the CNPA's first attempt to amend the Brown Act – SB 964 (Romero), stating that the bill "imposes an impractical standard for compliance on local officials and could potentially prohibit communication among officials and agency staff outside of a public meeting."[9]

The follow-up bill ultimately passed in 2008 to amend the Brown Act added new language specifying that the bill would not prevent an agency staffer, such as the city manager or a department head, from engaging in informational discussions about pending issues with the city council, so long as the staff person did not act an intermediary to help a majority of the council reach consensus on an upcoming vote. The new language removed concerns that prompted the previous year's veto. The 2009 amendments to the Bagley-Keene Act added similar language, clarifying that state agency, board and commission staff can conduct informational discussions with their board members so long as those discussions did not help the board reach a consensus on a vote.

Still, a Senate floor analysis of SB 1732 in 2008 stated that the CNPA's proposed new prohibitions on informal discussions by local government officials under the Brown Act (and a year later, for state officials under the Bagley-Keene Act) were "significantly broader" than the restrictions of

current law.[10] That broadening of prohibitions on informal discussions cited in the analysis, indeed, gave rise to many of the local- and state-level concerns reviewed by the Commission in 2014 and 2015.

Before and After: The 2008 and 2009 Enacted Changes to California's Open Meeting Acts for Local and State Government

The 2008 Brown Act Changes

Specifically, SB 1732 eliminated the following sentence from the Brown Act: "Except as authorized pursuant to Section 54953, any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of a legislative body to develop a collective concurrence as to action to be taken on an item by the members of a legislative body is prohibited."

The 2008 legislation added the following language to the statute, which now reads: "A majority of the members of a legislative body shall not, outside of a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body."

The legislation also added that this new language "shall not be construed as preventing an employee or official of a local agency, from engaging in separate conversations or communications outside of a meeting authorized by this chapter with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency, if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body."

The 2009 Bagley-Keene Act Changes

In 2009, AB 1494 eliminated the following sentence from the Bagley-Keene Act: "Except as authorized pursuant to Section 11123, any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the state body to develop a collective concurrence as to action to be taken on an item by the members of the state body is prohibited."

The legislation added the following language to the statute, which now reads: "A majority of the members of a state body shall not, outside of a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter of the state body."

The legislation also added that this new language "shall not be construed to prevent an employee or official of a state agency from engaging in separate conversations or communications outside of a meeting authorized by this chapter with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the state agency, if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body."

Unforeseen Implications of the words "to Discuss"

Many local and state government attorneys maintain that due to the statutes' inclusion of two words, "to discuss," elected and appointed officials of local government and state boards and commissions can no longer have informal conversations with their colleagues outside public meetings about issues pending before them – or even have general policy discussions. The Commission frequently heard during its study that these two words "to discuss" represent legislative overreach and an unintended consequence that has limited the ability to effectively govern some state boards and commissions. First Amendment and media interests attributed this reasoning to faulty legal interpretation and pledged to defend the language against any proposed amendments as a result of the Commission's study.

Sources: SB 1732 (Romero), 2008. http://lisprdweblb.calegis.net:7010/LISWeb/faces/bills/bill_search_results.xhtml. Also, AB 1494 (Eng), 2009. http://lisprdweblb.calegis.net:7010/LISWeb/faces/bills/bill_search_results.xhtml.

Perceived Governing Problems Due to 2009 Bagley-Keene Act Changes

Varying perceptions of governing difficulties due to Bagley-Keene Act restrictions has much to do with the differing natures of California's state boards and commissions. Most of California's hundreds of boards, commissions and councils are steered by volunteer appointees who serve on a part-time basis, meet monthly and communicate primarily with one another through staff.

These entities, as a result, tend to be less vocal about the 2009 Bagley-Keene Act changes and the resulting compliance issues reviewed by the Commission.

Professor Robert C. Fellmeth, executive director of the University of San Diego School of Law's Center for Public Interest Law, explained in August 2014 testimony to the Commission: "Most state board and commission appointees are essentially volunteers who are paid a symbolic *per diem* and meet once every month or two. The 'Executive Officer' they select does virtually all the administration. Hence there is a natural coordination throughout the agency without the need for any coordination among board or commission members."

But a handful of boards and commissions, such as the State Water Resources Control Board, California Public Utilities Commission and California Energy Commission, have heavy workloads and full-time board members with greater roles in agency administration. All these agencies cited new complications as a result of the 2009 changes to the Bagley-Keene Act.

"We don't have three members together outside of public meetings," said State Water Resources Control Board General Counsel Michael Lauffer during an October 2014 Commission advisory meeting on the topic. The state board has five full-time board members appointed by the Governor and confirmed by the Senate to four-year terms. Mr. Lauffer, reflecting a conservative legal interpretation of the Bagley-Keene Act adopted by many state attorneys, said, "I also counsel 10 regional boards (each with seven part-time members). The last thing I want is depositions saying, 'What did you talk about (outside a meeting)?'"

Many witnesses and participants acknowledged this widespread and conversation-stifling legal interpretation cited by Mr. Lauffer. At an October 2014 Commission advisory committee meeting, one participant said the state's decision-makers are held accountable by the Governor

and the public that elected them, but must make decisions in an isolated environment where they can't have open and robust policy discussions.

Professor Fellmeth concurred, telling the Commission, "The problem with the 2009 change is the possible overreach involved in its bright line formulation of "discuss" that applies not to just commissioners, but any "intermediaries (such as staff)," he stated. "The dangerous *Wolfe* decision warranted reversal or clarification," he said, "but it may have been over-corrected by AB 1494 when applied to this particular agency (the CPUC)."

Michael Asimow, a Stanford Law School visiting professor of law, also cited the CPUC, in acknowledging difficulties faced by state agencies in his March 2015 testimony to the Commission.

> *"We employ the multi-member agency structure in order to bring divergent policy views and different skill sets to the decision-making process. To achieve this purpose, the heads must be able to conduct serious and candid discussions of policy issues as well as agency management and priority setting," he stated. "My interviews with officials of the California Public Utilities Commission indicate the CPUC is tied in knots by Bagley Keene and unable to properly carry out its vast and vital regulatory responsibilities. It cannot manage the agency, achieve consistent results in different cases, or set priorities."*

The View from the CPUC

CPUC Commissioner Florio provided the Little Hoover Commission an inside view of perceived Bagley-Keene Act hindrances to governing in his August 2014 testimony, and also in an earlier conversation with the Commission. Commissioner Florio, a long-time senior attorney for The Utility Reform Network before his January 2011 appointment to the CPUC board, testified that the enacted 2009 changes produced an unintended impact of making "the CPUC's decision-making less transparent to the public, rather than more."

In written testimony, Commissioner Florio added, "Worse it has made the commission's already cumbersome processes more difficult and less timely. I also fear that the commission's decisions may be less well-informed than in the past and that accountability has been diffused due to lack of internal communication," he testified.

Commissioner Florio also provided an assessment of how the Commission operated before the 2009 Bagley-Keene changes and after:

> *"Prior to the 2009 amendments, Bagley-Keene provided that no three commissioners could, directly or indirectly through intermediaries, communicate with each other to develop 'a collective concurrence' as to the action to be taken on an item of business. Under this rule, three commissioners rarely if ever met privately to discuss an item of business, but the advisors to the various commissioners communicated regularly to keep each of the offices apprised of ongoing activities and to explain proposed decisions that would be coming up for a vote. This process worked well for decades to ensure that all commissioners were kept well-informed about the full range of the CPUC's business. Because advisors cannot commit the vote of the commissioners for whom they work, it was impossible to develop a 'collective concurrence' under this structure.*
>
> *Under the revised statute, the restrictions on communications among commissioner offices are much stricter – no three commissioners (or their advisors) can, through a series of direct or indirect communications, take action, deliberate on, or even* ***discuss****, any item of business that is within the subject matter jurisdiction of the agency. The restriction is not limited to matters that are pending for decision – no "item of business that is within the subject matter of the state body" can be discussed by more than two commissioners or their advisors. In an agency with jurisdiction as broad as the CPUC, this is a significant limitation on communications among offices."*

Ed O'Neill, who worked 20 years at the CPUC, then entered a private law practice before being appointed by Governor Brown to serve as special advisor to the CPUC in May 2014, told the Commission in July 2014 that he sees a major change in decision-making practices as a result of the 2009 enacted changes to the Bagley-Keene Act. "The one thing that's really striking now in contrast to the way it functioned earlier is the commission officers function in sort of a siloed manner," he said. "It's entirely as a result of Bagley-Keene restrictions making sure there is no discussion among the offices of substantive issues."

Commissioner Florio, in a conversation with the Little Hoover Commission before the August 2014 hearing, said commissioners follow advice of the CPUC's legal team regarding Bagley-Keene restrictions. "It's the word 'discuss' that makes our lawyers think we can't talk to one another," he said. Lobbyists, meanwhile, can talk to all five commissioners and learn "like bees spreading pollen" about varying

positions, he said. "Lobbyists who talk to all five commissioners may know how the vote will come out while commissioners don't."

Elaborating on the remark in August 2014 testimony to the Commission, Commissioner Florio said, "In fact, it is sometimes the case that everyone in the audience at a commission meeting knows what the outcome of a vote on a particular matter will be before it occurs – everyone, that is, except the five commissioners and their advisors."

He said the 2009 limits on discussion also have compartmentalized decision-making, in that individual commissioners know specific things about different aspects of large issues, but cannot talk to one another about them. "There are so many cross-cutting currents with these issues that we're not getting decisions that reflect the totality of the board," he said. "This prevents us from seeing the bigger picture of what we do."

During a July 2014 telephone conversation with the Little Hoover Commission, Michael Picker, then Commissioner and now president of the CPUC, said, "It makes us an agency where commissioners become isolated adjudicators instead of policymakers." President Picker, formerly a senior advisor for renewable energy to Governor Brown, was

At a Glance: The California Public Utilities Commission

The California Public Utilities Commission is a state agency that regulates privately-owned electric, natural gas, telecommunications, water, railroad, rail transit and passenger transportation companies. Based in San Francisco, it has 1,000 employees and is run by five full-time commissioners appointed to six-year terms by the Governor and confirmed by the Senate. The Governor appoints one of five commissioners as president.

The agency has one of state government's longest-running histories, dating to the 1879 Constitution, which established a three-person California Railroad Commission to regulate a growing network of railroads. Histories of the era suggest that the commission quickly failed to fulfill its hopes due to inexperience with the complexities of setting rates and also being overly influenced by the dominant railroad companies.

A revitalized, more powerful California Railroad Commission emerged in 1911 during the Progressive Era as a result of legislative action prodded by Governor Hiram Johnson and political pressures exerted by the business community. The 1912 Public Utilities Act extended authority of the commission over power and light companies, street railroads, telephone and telegraph companies and public wharves.

Historical accounts report that power and telephone companies welcomed the state commission's regulation as a means to ease the costly competition among them and remove them from the whims and corruption of local politics. The commission quickly succeeded in lowering railroad rates statewide and during its first four years facilitated the issuance of $500 million in bonds by public utilities.

In 1946 the commission expanded to five board members and was renamed the California Public Utilities Commission to reflect an expanding regulatory landscape that continues to this day.

Sources: Mansel G. Blackford. 1977. "The Politics of Business in California, 1890-1920." Pages 81-93. Columbus, Ohio. Ohio State University Press. On file. Also, California Public Utilities Commission. 2014. "CPUC History & Structure." San Francisco, CA. http://www.cpuc.ca.gov/PUC/aboutus/puhistory.htm.

appointed to the CPUC governing board in January 2014 and named president in December 2014.

President Picker agreed during the July 2014 conversation that Bagley-Keene restrictions on discussions among commissioners and advisors have driven the consensus-building process further down to the staff level – and made the process less transparent. "It has driven exactly the opposite effect that people intended it to," he said. Speaking then as a relatively new commissioner, he said, "The other thing I have noticed is that commissioners are never here. Why would we go into a building where we can't talk to people?"

Mr. O'Neill, appointed to help modernize the CPUC, said the commission's extraordinarily large and complex workload compared to most state boards and commissions compounds the problems of limited discussions before meetings. "These general rate case decisions involve huge amounts of money, hundreds of technical complexities, many of which the commissioners have no time to talk about beforehand," he said.

Commissioner Florio provided details of the workload, explaining that governing board members receive copy-paper-sized boxes of meeting materials every two weeks in preparation for their bi-weekly voting meetings where they might act on dozens of agenda items. Hundreds of other public hearings are held each year on a broad variety of topics from utility rate setting to policies on electricity demand management and long-term transmission planning. The April 9, 2015, CPUC voting meeting, for example, featured 51 agenda items, while the August 14, 2014, voting meeting, featured 80 agenda items.

The View from the California Energy Commission

Representatives of the California Energy Commission (CEC) also participated in the Commission's review of the 2009 Bagley-Keene changes, commenting in August 2014 and again in February 2015 that the changes had disrupted long-standing governance procedures in place at the Commission.

In a February 26, 2015, letter to the Little Hoover Commission, CEC Executive Director Robert P. Oglesby stated, "The amendments are very broad and have led agencies, such as the Energy Commission, to restrict even general policy and administrative discussions, both among Commissioners and between Commissioners and staff, for fear that those discussions may be unlawful serial meetings."

Added Mr. Oglesby: "This is at odds with the apparent intent in the Energy Commission's organic statute, which requires each Commissioner to possess a distinct set of skills and experience – law, economics, environment, science and public – to ensure a comprehensive perspective on energy issues. Limitations on their ability to share these perspectives on broad policy issues undermine this intent."

"The CEC is different than the PUC. We are fundamentally a policy body. We are supposed to talk with each other," CEC Commissioner and Attorney Designate Karen Douglas told the Commission in August 2014. "We are supposed to have this diverse body in order to discuss these ideas and make these decisions as a body," she said.

Ms. Douglas told the Commission that the broad nature of the 2009 Bagley-Keene changes make it difficult to know what kind of discussion is a potential illegal serial meeting and what is not. "It's really hard for my counsel to tell me what is, or what is not, on that side of the line," she said.

Ms. Douglas, appointed to the CEC in 2008 before the Bagley-Keene changes, recalled how she would casually invite a fellow commissioner to lunch to talk about their general impressions of the future of solar energy and other issues – sharing knowledge on common issues without thought of developing concurrence on future policy votes.

That was then, she said. Now, said Ms. Douglas, "I can't open up dockets and read through testimony or someone's comment letter and walk into his or her office and say, 'I was kind of disturbed what I read there and made me think we might have a problem there and I just want you to read it.' These are the things I can do only when we have a noticed public meeting. We don't have a noticed public meeting every day."

Jason Levy, then General Counsel for the CEC, also told the Commission at its August 2014 hearing that the Bagley-Keene restrictions on informal discussions run contrary to the structure of the CEC and its purpose. "We're talking here about shutting down a dialogue that members of the state body were selected from different expertise to bring to the table," he said.

At a Glance: The California Energy Commission

The California Energy Commission is state government's primary energy policy and planning agency. Established in 1974 and based in Sacramento, it has 640 employees and is run by five full-time commissioners appointed by the Governor and confirmed by the Senate for five-year terms. The Governor also selects a chair and vice chair from among the members every two years.

The energy commission forecasts future energy needs, sets energy efficiency standards for buildings and appliances, supports energy research, develops renewable energy resources, advances renewable transportation fuels and certifies thermal power plants larger than 50 megawatts.

Source: The California Energy Commission. "About the California Energy Commission. http://www.energy.ca.gov/commission

"The effect is the staff ends up resolving issues that would otherwise be commissioner discussion and staff are generally civil servants. They aren't subject to oversight except by the state body. They certainly aren't appointed by the Governor. So what we do is decrease democracy and tender it down to staff to resolve on a day to day basis unless they rise to the level of being something that gets called out at a public meeting during the ultimate adjudication of the issue. And that I don't believe helps the public. It hurts the public," Mr. Levy said.

Revamping the CEC Governance Structure

Commissioner Douglas, who chaired the CEC at the time the Bagley-Keene changes went into effect, said the organization's governance system changed significantly as a result. "We completely revamped our internal processes. We completely revamped our ways of doing business," she said. "Not solely because of these amendments. But these amendments were the precipitating cause of our making very substantial changes."

Ms. Douglas said the CEC functioned for years with two-commissioner subcommittees on different topics that interacted with the chair, the Commission, the public and stakeholders. But she said the system became unworkable when other commissioners believed they couldn't have discussions with those subcommittee members due to 2009 Bagley-Keene Act changes. Single-commissioner committees that could talk with only one other commissioner replaced the old system.

"We moved away from a decades-long culture of designating advisory policy committees to work with stakeholders and frame issues and help bring recommendations to the business meeting to a culture where we modeled the CPUC by assigning lead commissioners and having those lead commissioners, not exclusively, but virtually exclusively, buddy – we call it Bagley-Keene buddy - with the chair. We moved to a hub-and-spoke model with the chair at the hub," Ms. Douglas told the Commission. "That's had various implications, some good, some bad, but it's a very different way of doing business than what we had before. We're trying to manage and trying to maintain our silos because we've decided silos are the easiest way to handle these issues," Ms. Douglas said.

The View from the California Coastal Commission

The Little Hoover Commission also solicited views from the California Coastal Commission. The Coastal Commission is subject to the Bagley-Keene Open Meeting Act as it makes decisions affecting many

Californians and valuable coastal properties. The Coastal Commission, in partnership with coastal cities and counties, plans and regulates land subdividing, building construction and development proposals that change the intensity of land use or public access to coastal waters. These activities generally require a coastal permit from either the Coastal Commission or the local government. The San Francisco-based commission, which has 12 part-time voting members supported by a staff of 167, holds monthly meetings that last three or more days.

The Commission heard views of three coastal commissioners regarding the impacts of the 2009 Bagley-Keene Act changes.

Mark Vargas, a coastal commissioner, and former member of the Little Hoover Commission, said in a mid-2014 telephone conversation with the Commission that he generally does not think the Bagley-Keene Act or the 2009 amendments impede the commission's ability to carry out its duties. Mr. Vargas said there are typically 60 to 80 agenda items per meeting and commissioners receive voluminous background materials before each meeting. Like the CPUC, the Coastal Commission agenda items often have significant fiscal impacts. As a result, members follow strict general counsel guidelines regarding the Bagley-Keene Act, he said.

Similarly, in an August 25, 2014, letter to the Little Hoover Commission, Coastal Commissioner Mary Shallenberger stated: "There has been no noticeable difference in the way Coastal Commissioners are able to interact with the public, one another, staff or conduct its business since the 2009 amendments."

Commissioners Vargas and Shallenberger explained that the Coastal Commission added an item on its agenda each month for commissioner comments – providing an opportunity for commissioners to publicly raise concerns and discuss issues among themselves. Commissioner Shallenberger said the Coastal Commission routinely holds public briefings and workshops on such subjects as coastal agriculture, sea-level rise, coastal wetlands and condos and hotel properties. She said the hearings are well attended, broadcast via the Internet and offer "an excellent demonstration of conducting public policy discussions in an open, transparent and public manner."

Commissioner Shallenberger also described the Coastal Commission's two-member subcommittees which meet privately to discuss specialty topics. "These subcommittees have no authority to make decisions on behalf of the Commission, but do report back in open session, providing the Commission and public an airing of the substance of subcommittee meetings and any recommendations from subcommittees. This subcommittee process works well because as a 15-person commission

with 12-voting members, two commissioners can easily meet and confer without nearing a quorum."

But Ms. Shallenberger acknowledged: "In a smaller size commission or board, however, use of this type of subcommittee may not be feasible or appropriate."

A Counterview on the Bagley-Keene Act Changes

Coastal Commissioner Jana Zimmer offered a counterview of the 2009 changes in a letter to the Little Hoover Commission, describing "uncertainty and confusion" as a result of the new restrictions, and also, the "very cautious advice from our attorneys as to the scope of discussions we may have among ourselves." Commissioner Zimmer stated:

> *"One example I recall is that when I first was appointed, several Commissioners were interested in creating an opportunity for give and take on the relationship of the Coastal Act and its development permit requirements to the preservation of agriculture as a viable use in the coastal zone.*
>
> *Five of us (less than a majority) wanted to get together informally and brainstorm approaches, and to organize a preliminary meeting with local ranchers and farmers, as well as environmental interests. We were told that if more than two Commissioners met and discussed these issues, even to develop ideas about how to approach them to later share at a full Commission meeting, we would risk becoming an 'illegal' committee under Bagley Keene.*
>
> *Thus, we had to wait for a year and a half until the staff was able to organize a full public workshop. We had the workshop, which was very informative, but there has been no opportunity for follow through, because staff has other, multiple-issue areas to try to address, which are even more pressing as Coastal Act priorities.*
>
> *Because the Commission is so constrained in exploring emergent policy issues in public, and to actively participate in the formulation of recommendations, the result can indeed be to effectively 'drive (and keep) decisions down to the staff level', with the appearance that our agency is less transparent than we are actually committed to be."*

Media Interests: Amending the Bagley-Keene Act and Brown Act is Not the Solution

Sponsors of the 2009 Bagley-Keene Act changes and the 2008 Brown Act changes are blunt regarding contentions that there are problems with the statute.

"With all due respect we don't think this is a model or a law that is broken, that needs fixing," California Newspaper Publishers Association (CNPA) General Counsel Jim Ewert told the Commission at its August 2014 hearing. Mr. Ewert, in written testimony to the Commission, stated, "CNPA firmly believes that the public is well served by the requirement that Commissioners discuss, deliberate or reach consensus on an item, in an open and public meeting and we would stridently oppose any proposed change to existing law."

The CNPA and other First Amendment groups held firm to that opinion throughout the Commission's study process of the 2009 changes to the Bagley-Keene Act and 2008 changes to the Brown Act. Mr. Ewert, when personally questioned by Commissioners at the August 2014 hearing about ways to address concerns raised by CPUC and CEC representatives, answered, "I don't think there's anything that needs to be fixed. I would characterize interpretation of the existing law as being ultraconservative by attorneys and members who have made the presentations to you."

Mr. Ewert added, "In hearing some of the scenarios brought forth by the CPUC and the member of the California Energy Commission, I find it kind of interesting that there seems to be ignoring some of the words in the statute."

Mr. Ewert told the Commission that two members of a five-member body can, indeed, have informal policy discussions under the Bagley-Keene Open Meeting Act – because two is not a majority of the body. He also noted that in the case of the CPUC, a commissioner with particular expertise on a topic can share information or a report with CPUC staff, which in turn, can inform all the other board members. "So long as that person does not communicate to members of the legislative body the comments or positions of other members of the body," he added.

Representatives for the CPUC and CEC countered, however, that their regulatory work often involves issues in which companies have tight time frames and millions of dollars, even billions of dollars, on the line. They said the legal risk of having decisions challenged over Bagley-Keene Act

issues is simply too high to justify the more liberal interpretation of the act suggested by Mr. Ewert.

Mr. Ewert, however, addressing suggestions that the law be modified slightly to clarify some of this legal uncertainty expressed by state government attorneys, told the Commission, "All of these solutions would likely be unconstitutional, contrary to the will of the people and would promote a public policy that embraces secret government. In light of recent reports describing the coziness between the CPUC and the utilities it regulates, it shocks the conscience that this issue is worthy of consideration," he testified.

The Commission heard similar opposition to revisiting the 2009 and 2008 changes from Peter Scheer, executive director of the San Rafael-based First Amendment Coalition, and Terry Francke, General Counsel for Californians Aware, the Center for Public Forum Rights. At the Commission's October 2014 advisory committee meeting, Mr. Scheer, said, "I'm not so convinced that the Bagley-Keene Act is broken in its current language." Mr. Scheer said he is sympathetic to the notion that some agencies "need a mechanism" to communicate, but said he fears that new changes could go too far in the other direction. "It would be too hard to police. How do you know what's substantive and what's non-substantive? Most cases would tend toward the middle and be a gray area for commissioners and for interested parties wanting to know what was discussed."

Mr. Francke, responding to a former California mayor's remarks about the need at the local level to informally discuss some issues with colleagues outside public meetings – while still not coming to concurrence on a vote – said, "I hear you talking about the need to keep political secrets." Mr. Francke said it is part of the job of public officials to talk frankly in public forums "and take the heat for doing so."

The Brown Act and Local Government

The Commission's extensive review of the 2009 Bagley-Keene Act changes and their impacts on state-level governing eventually led it also to consider impacts of the 2008 Brown Act changes on operations of local and regional government entities. Thousands of elected officials in California – mayors and city councilmembers, county supervisors, school board members and those elected to run 2,300 special districts – fall under the provisions of the Brown Act, as do the members of numerous advisory bodies and commissions appointed by the locally elected officials. Just as the Bagley-Keene Act limits informal discussions outside public board and commission meetings, the Brown Act prevents

a majority of local elected officials from talking informally about their issues outside of public meetings.

The Commission initially encountered limited success in attempting to determine whether the 2008 Brown Act changes hampered or constrained local governing throughout California. Many local elected officials were reluctant to participate at the Commission's public advisory committee meetings or speak on the record regarding their private frustrations with the Brown Act changes. Most said the risks of media backlash and criticism in their communities were too high. As the study progressed, however, the Commission eventually heard from local elected officials who publicly confirmed that the same governing difficulties reported by state officials due to the Bagley-Keene Act changes are occurring locally due to the Brown Act changes. The Commission's December 2014 statewide survey of city, county and special district office holders provided more anecdotal accounts, although anonymous, of significant governing challenges resulting from Brown Act constraints on informal discussions among elected officials.

The Commission's exploration of the Brown Act involved initial conversations with the California State Association of Counties and the League of California Cities, a partner in drafting the original 1953 Brown Act, and also the 2008 changes sponsored by the CNPA. Representatives of both associations reported to the Commission that they have heard few reports from their members about problems complying with the 2008 Brown Act changes. At the Commission's October 2014 advisory committee meeting, a League of California Cities representative explained that while the process of complying with the current standards of the Brown Act may at times be frustrating, local officials are functioning within its environment. The League representative said the current standard is working "despite how frustrating it may be." The representative also said city councilmembers and mayors are "accepting this reality" and are progressively getting better at finding a balance to discuss issues among themselves and the need to make decisions.

Some Local Elected Officials Provide a Different View

At the Commission's October 2014 advisory committee meeting however, former Long Beach Mayor Bob Foster disagreed with the League's assessment, telling the Commission that the 2008 Brown Act changes have, indeed, limited councilmembers' ability to talk privately among themselves about even the most general local policy issues. He said the Brown Act constraints on informal conversations outside public meetings tend to isolate decision-makers from one another and result in poorer quality decisions. Mr. Foster acknowledged the contentions by CNPA

and other First Amendment groups that public officials should conduct all their conversations at the microphone, but said doing so is politically and realistically impossible.

"You say you can do it in public, but there you don't have the ability to say stupid things. Some opponent will post it online and cram it," he said. Mr. Foster said it works the same way at the state level. "If commissioners were to play devil's advocate, the public might misinterpret their position, use it against them and demand a recusal from the decision." Mr. Foster said Brown Act rules that limit policy discussions to public meetings do not lead to better decisions.

The Commission heard similar contentions about Brown Act constraints on informal discussions and their consequences for local governing at its May 28, 2015, advisory committee meeting. There, four city councilmembers and a board member of a nonprofit arts organization formerly bound by the Brown Act, described their difficulties in gathering information, deliberating effectively and making good decisions because of Brown Act limitations on informal conversations. They also engaged in further public dialogue on the 2008 Brown Act changes with Mr. Ewert of CNPA.

During a roundtable discussion, participants described how the changes have created less transparency at City Hall instead of more, and given lobbyists, city staff and outside interests additional power to influence votes for their own ends. They also described the ease of unintentionally violating the Brown Act, the ever-present fear of Brown Act lawsuits and the hundreds of thousands of dollars in public funds paid to litigants. When asked by the Commission during the discussion why local government attorneys interpret the 2008 Brown Act changes so conservatively and restrictively, City of Indian Wells Mayor Pro Tem Dana Reed answered, "Because they keep losing in court."

Mr. Reed told the Commission that Brown Act charges are tossed about almost casually during controversial issues. "That seems to be the number one claim when people are upset. 'Oh, you violated the Brown Act,' when they don't even know what the Brown Act is."

Restrictions on Informal Discussions

Several participants in the meeting said they were surprised upon being elected at their inability to bounce general policy issues off their colleagues informally, learn much from one another or have the kind of talks outside public meetings that might lead to good compromises.

"I want to go back to the first week I got elected, my second day in office in 2012," Concord City Councilmember Edi Birsan told the Commission. "I arranged a meeting with a current councilmember, bringing a list of the 40 things I wanted to do. The next week I met with the city attorney. He said, 'You are prohibited from talking about those ideas with the other councilmembers.' That's absurd." Birsan said he also was advised at a League of Cities training session on the Brown Act to "defriend" members of the council on his Facebook account because a series of online postings could be considered an illegal meeting.

Mr. Birsan said he has since learned to designate one other councilmember on his five-member council as his "Brownie," meaning he can talk informally with just that member on a particular topic. "Who is the Brownie I can talk to on bikes? Who is the Brownie I can talk to on the Concord Naval Weapons Station? That's a $20 billion deal and I'm allowed to have a discussion with one person," he said.

Mr. Birsan added, "I also have a billion-dollar development with 28,000 people going to move in and we're about to pick a master developer and I can only talk to one of my guys?"

Los Angeles City Councilmember Robert Blumenfield, elected in 2013 after serving in the Legislature from 2008 to 2013, said he was immediately struck by the Brown Act limitations on talking with council colleagues in contrast to the Legislature, "where the way you get things done is to talk to people." He told the Commission at the May 2015 meeting, "I have a committee of three members, which I chair. If I go to the Rand Corporation for a policy conference with 500 people where Bill Gates is speaking on the future of technology in government and someone tells me a member of my committee is also there (at a meeting that is not public, but also not publicly noticed under the rules of the Brown Act) I have to leave and can't listen to Bill Gates in a crowd of 500 people."

Mr. Blumenfield also discussed his limited options to talk informally with other members of the seven-member council committee that crafted a $15 minimum wage proposal approved in May 2015 by the 15-member council. "All members who are not on that committee can hardly weigh in until it comes to the council already cooked," he said.

Fellow Los Angeles Councilmember Paul Krekorian also told Commission staff in a May 2015 interview that he lacked ability to weigh in on the minimum-wage proposal before it came to a vote. He said any councilmember could go to a bar, baseball game or farmers market and talk to anyone there about whether a new minimum wage was a good idea or a bad idea, or what percentage increase made it a better idea.

But he couldn't have the same informal discussion with colleagues who were crafting the idea.

One Commissioner suggested that provisions of the U.S. Constitution might overrule the Brown Act's restrictions on the deliberative process in legislative bodies such as city councils. The Commissioner specifically cited Article 1 Section 1 of the Constitution, which declares, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The Commissioner contended that the Constitution grants immunity to people involved in a legislative process for participating in the central deliberative process of talking freely and without restrictions. He suggested more legal emphasis on giving the public the ability to be heard, to know what information is part of the record before making a decision and seeing the legislative findings behind a decision "as opposed to probing the mind of the people making the decision." Mr. Ewert, representing the CNPA, countered that Brown Act violations do not fall under the umbrella of the U.S. Constitution, and if so, a First Amendment argument against violators would prevail.

City of Sacramento Vice Mayor Allen Warren told the Commission about his council's use of ad hoc committees that contain less than a voting majority of the nine-member council and discuss general policy issues before taking a proposed direction public. "Before it comes to a final decision it helps us get at bigger issues, whether they are about water or the Sacramento Kings arena," he said. As of May 2015 the council had three ad hoc committees, including the Good Governance Ad Hoc Committee chaired by Mr. Warren to discuss proposals for an ethics code and citizens commission that may draw city council district boundaries.

The vice mayor acknowledged the restrictions noted by Mr. Blumenfield and Mr. Krekorian, saying sometimes a councilmember feels left out of these committee discussions or hears gossip about its direction from outside sources, including the media. "We can't talk to that person to iron it out," he said. "As time goes on they may take an anti-position."

A Recipe for Less Transparency in Local Government

Not surprisingly within the uniquely human institutions of local government, the lobbyists and interest groups, as well as unelected government staff, recognize the limited ability of decision-makers to talk with one another and find ways to exert stronger influence themselves on outcomes and decisions, participants said. Their third-party power is in having more inside information about the direction of a potential vote than the elected officials operating under Brown Act restrictions. Many

have described this scenario to the Commission as a major unintended consequence of open meeting act changes, saying that it drives more public decision-making down to the staff level or completely out of sight.

"You can get outgunned by lobbyists," Mr. Blumenfield told the Commission. "They can have a voting card on any issue. They can talk to all the councilmembers. I have lobbyists telling me what's going to fly and what's not going to fly. Outside interests have more knowledge and control than we have on the inside. They craft compromises that carry the day."

Mr. Warren told the Commission, "The fact that lobbyists can move around information is troubling. But more powerful are the city managers. They can say, 'Your counterpart is thinking this or thinking that.' You can be manipulated."

Mr. Reed offered an example from Indian Wells where a retired attorney quietly brokered a council consensus on a particular issue that had long gone unresolved. "He took it upon himself to call people, present it to all the councilmembers (individually) and say, "If you introduce this, I think you can get five votes."

"He was the sixth councilman," a member of the Commission responded, hearing the story. "Yes," answered Mr. Reed. "The guy had good intentions. But you have lobbyists who aren't good."

Mr. Birsan said another parliamentary tactic that stems from rules limiting internal communications and the simultaneous need for a council vote to put items on its agenda is "to grab a third party and ask them to bring up a matter obtusely. These workarounds usually involve third parties, which in the spirit of the Brown Act, is a gross violation."

Finally, Mr. Blumenfield explained to the Commission how a council can itself play politics with the Brown Act restrictions on informal conversations among more than two colleagues on a particular issue. "If you wanted to silence a member from talking to someone else, you just get to them first and you lock them out."

"That's exactly what happens," added Mr. Birsan.

Abuse of Public Comment Opportunities Required by the Brown Act

The Commission also learned about another dimension of the Brown Act from Mr. Blumenfield, who described repeated abuse of public comment

opportunities at Los Angeles City Council meetings. Mr. Blumenfield said a group of the same commenters add approximately 14 hours monthly to council meetings by offering remarks on nearly every agenda item, and often in an abusive fashion.

"We have 10 or more who come in and sing crazy songs, curse like drunken sailors and use funny voices," he said. (A Commission staff review of the May 26, 2015, Los Angeles City Council video showed one commenter wearing a red Ku Klux Klan costume. Blumenfield told the Commission this commenter won a significant legal cash settlement from the city after his behavior led a city commission "that wasn't lawyered up" to usher him out of the room during a meeting).

"The Brown Act has created a circus atmosphere and disrespect to the public process," he told the Commission. Mr. Blumenfield said one visiting group of fourth graders was subjected to a commenter describing a sex act. "Millions of dollars of staff time and council time that could be used to solve problems is taken up by these 10 people," he said. "This unbridled comment is creating less public input. The real public gets disgusted and leaves."

Sherry Diamond, a board member with the Arts Council for Long Beach, which recently declared itself free from Brown Act obligations due to no longer having a grant funding relationship with the City of Long Beach Redevelopment Agency, said under the Brown Act their meetings were routinely disrupted by public comment from the same people.

"I mean a public of two in a city of half a million people, who considered it their mission to derail the agenda and take us down rabbit holes and disrupt and interfere with the business at hand." Often, Ms. Diamond said, the commenting had little to do with the agenda item, and was more about attacks on the volunteer board of directors.

Mr. Blumenfield told Commission staff in an interview that the Legislature doesn't tolerate similar behavior during its committee meetings. "We would not allow that in Sacramento," he explained. "There was a level of decorum. I could ask the sergeants to take them out."

Mr. Ewert told the Commission that the Brown Act does allow an elected body to block comment that goes off topic – and remove a commenter from the room. But he also told the Commission that drawing the line between free speech and abusive speech is difficult. "We struggled with this," he said. "What is legitimate comment and what is not?"

A Debate About Solutions to Brown Act Constraints

"I appreciate that this is a difficult issue to try to get the sweet spot," Los Angeles City Councilmember Paul Krekorian told Commission staff during an interview before the May 2015 advisory committee meeting. The Brown Act does great things to move away from smoke-filled rooms. We don't have the old environment of bosses. That's all good, but it comes with an inherent loss of quality of debate and information gathering. I wish I could give you where that sweet spot is. I don't know. But I feel we have excessive constraints."

During its May 2015 advisory committee meeting, Commissioners suggested that adding just a few words to the Brown Act's statutory language might offer greater clarity for government attorneys and allow more informal general discussions that don't seek concurrence on upcoming votes.

"That would be a great step forward," Mr. Birsan replied.

Mr. Ewert, general counsel of the CNPA, disagreed. He repeated a contention he made at two previous Commission meetings on California's open meeting laws: It is difficult to draw the line between informal conversations about general issues and conversations that eventually tilt toward consensus reached in private and not in public at an open meeting. He told the elected participants in the Commission's advisory committee meeting, "Each and every one of you are public servants with the best of intentions. It doesn't enter your mind that there are others. The Brown Act protects the public from those people. It is the most egregious examples where the Brown Act protects the public. Most Brown Act lawsuits deal with egregious violations."

Asked again by the Commission how California lawmakers might adjust the Brown Act's statutory language to ease the problems described by meeting participants, Mr. Ewert said, "We don't think it's broken. With respect to the problems, there is a way to do this. Deliberate openly. Deliberate publicly."

The Commission's Brown Act Survey of Elected Officials

In the Commission's anonymous survey conducted in December 2014, a majority of local elected officials confirmed and echoed the sentiments expressed by participants in the October 2014 and May 2015 meetings.

The Commission received 271 responses – including 209 from board members of special districts, 19 from county supervisors and 43 from

city councilmembers and mayors. The anonymous surveys, conducted electronically via SurveyMonkey software, were distributed by the Sacramento-based California Special Districts Association, California State Association of Counties and League of California Cities.

The Commission recognizes that 271 responses are a small sampling of statewide opinion and cannot be assumed to be statistically valid. Participation rates have generally been less than 10 percent of all members in each of the three categories. More, the responses are anonymous, which limits the Commission's ability to gauge credibility.

But the message from this sampling is relatively clear and consistent. A majority of respondents feel their information-gathering efforts outside public meetings are constrained by the 2008 legislative changes to the Brown Act and the resulting legal uncertainty over the two words "to discuss." Many officials participating in the Commission's survey responded that their inability – or perceived inability – to discuss issues with colleagues outside of public meetings has lowered the quality of decision-making within their boards or councils. A two-thirds majority of respondents recommended Brown Act changes that would allow two or more members of the body to discuss issues generally outside public meetings under the condition that they not try to form a consensus or count votes on specific issues before them.

Nearly all respondents from special districts, city councils and county boards of supervisors said their legal counsels advise a strict interpretation of the Brown Act. These strict legal interpretations, responding officials said, help avoid costly lawsuits. They also limit politically-driven allegations of Brown Act violations, which are frequently made by interest groups and citizens as they consider and decide controversial issues.

Generally, local government respondents echoed testimony provided by state officials and agency lawyers at the Commission's August 2014 hearing. That is, they must strictly and narrowly interpret the words, "to discuss" to limit their legal exposure regarding decisions that are often controversial and have millions or billions of dollars at stake.

One city council member, operating within these legal constraints, explained, "Currently there is so much confusion surrounding this act that many folks would prefer not to speak with one another than to risk being in violation of the Brown Act."

Despite this confusion, a sizeable minority of survey respondents argued for making no changes to the Brown Act. Some said that too many local government bodies already play fast and loose with the act – or haven't

taken time to understand it. Loosening the standards, these officials said, would only encourage additional unnecessary secrecy and provide pathways for more violations. A chart detailing the overall sentiments of respondents is listed in Appendix C.

An Insightful Range of Individual Brown Act Experiences

The Commission also received dozens of insightful essay responses that described perceived problems and compliance issues with the Brown Act in everyday governing of thousands of local jurisdictions in California. A selection of comments received by the Commission is included in Appendix D. These survey responses, while not statistically validated to claim an accurate rendering of opinion among California's elected officials, nonetheless provided the Commission a thought-provoking sample of sentiment regarding compliance issues with the Brown Act.

The survey offered many examples of legal confusion and perceived problems in information gathering and decision-making as a result of the 2008 changes. Yet even those favoring more freedom often recognize that there is a fine line, easily crossed, between discussion and consensus building. The Commission is grateful for cooperation of the California Special Districts Association, California State Association of Counties and League of California Cities in distributing the survey to their members on behalf of the Commission.

Ex Parte Communications: Talking Privately with Government

Each day inside California's massive state government thousands of lawyers, business representatives, environmental advocates and lobbyists for the powerful enter the offices of legislative and agency decision-makers and talk one on one, and in private. Few outside these meetings ever know the arguments advanced or the policies advocated, and there is no opportunity to rebut the points of these conversations – except to schedule a similar private meeting with the decision-maker.

An ancient Latin legal term describes these conversations as "ex parte communications." That is, they are communications "by or for one party," or "by one side." *Lobbying* is another, perhaps more familiar way, to characterize these conversations between interest groups and government officials.

Generally, ex parte communications in state government are initiated by representatives of an interest group, corporate organization or trade association trying to inform or influence a developing or pending legislative or executive branch decision. But they also can work the other direction. Government decision-makers frequently use them to obtain expert information relevant to a pending decision or vote. One federal court has described these communications as the "bread and butter" of government administration – an endless series of back-and-forth conversations that keep decision-makers in touch with regulated interests and the public – and those interests and the public inside the loop with government officials.[11]

Yet for all the perceived helpfulness of these private conversations in maintaining open lines of communication, they also contaminate public attitudes toward government. Much of the public believes these constant private oral conversations tilt the scales toward influential interests experienced in getting appointments with decision-makers – and rig the system in their favor.

"We have thought for years this is one of the most important subjects in government," Edward Howard, senior counsel of the University of San Diego School of Law's Center for Public Interest Law, told the Commission at its March 2015 hearing.

> ***"Ex parte communications are neither intrinsically evil, nor intrinsically good."***
>
> Michael Strumwasser. Partner. Strumwasser & Woocher, LLP. Los Angeles, CA. March 5, 2015. Testimony to the Commission.

These thousands of daily, secret ex parte communications represent a third dimension – in addition to Bagley-Keene Act and Brown Act impacts on governing – of the Commission's review of transparency rules and governing issues in state government. Though different, in that the open meeting acts guarantee public access to the conduct of government business and ex parte rules provide fairness to varying and even opposing interests involved in government decisions, the two are interrelated as open government issues.

During its 10-month review, the Commission consulted with numerous experts on ex parte rules, policies and practices in state government. Many advised the Commission during an August 2014 hearing and October 2014 roundtable discussion on the topic. More testified at a March 2015 Commission hearing. As it conducted its review, the Commission examined current and historical views about the legality and appropriateness of these off-the-record conversations and heard about their pros and cons.

The Commission also reviewed ex parte rules and practices at specific California state agencies and learned about those used at federal agencies. Commissioners considered such issues as whether more of these communications should be disclosed, what should be included in those disclosures and who has the responsibility to enter the disclosure into the public record?

In addition, the Commission considered whether relaxing open meeting laws – to allow more informal private discussion among elected and appointed officials – might be compensated by requiring more airing and disclosure of ex parte conversations. Guiding the Commission's inquiry throughout the review was this overriding question: What is the proper balance between the public's right to know and officials' need to govern effectively?

Different Rules for the Legislature and the Executive Branch

California's state government operates with a variety of differing ex parte rules and policies that require lobbyists and advocates to be experts at what kind of conversations are allowed when and where, and when they must be disclosed publicly and to what extent. In the Legislature, private conversations are an uninhibited, central factor in daily information gathering and deliberations. Anyone can talk with anyone at any time. Lawmakers and lobbyists can tell others about their private conversations or keep them secret from one another. But in the executive branch, the rules are often gray and complicated. Private

conversations between outside interests and decision-makers are legal and appropriate in some instances and types of formal proceedings and illegal in others.

Here, briefly, is an introduction to the landscape of ex parte communications – both the art of pulling aside a government decision-maker to quietly discuss and privately influence a pending issue, or asking questions from within a government agency to gain a larger perspective:

- Private conversations are banned in all adjudicatory (judicial-type) proceedings in which state agency decisions are made by administrative law judges or hearing officers after hearing evidence from contending parties. Typically, these proceedings involve revoking permits and issuing cease-and-desist orders or cleanup orders as part of enforcement actions, as well as granting some permits. These proceedings follow the rules of court, in which judges can consider only evidence presented at an open trial and not arguments made privately in their chambers. The Commission did not address, nor consider recommending changes to ex parte rules in adjudicatory matters.
- Private ex parte communications are largely allowed and encouraged in informal rulemaking proceedings of state government, where agencies adopt regulations for such matters as safe food and drinking water, nursing home safety or energy efficiency in new homes – and make decisions after public hearings and public comment periods.
- Private ex parte conversations also are permitted in so-called "quasi-legislative" proceedings where agencies decide general policy issues that affect broad classes of people and not individual interests alone. An example is the California Energy Commission's biennial Integrated Energy Policy Report which considers "trends and issues concerning electricity and natural gas, transportation, energy efficiency, renewables and public interest energy research." But there also are a variety of hybrid proceedings within state government that contain elements of both judicial and legislation proceedings – such as granting permits or setting electricity rates charged to consumers – all with a mix of rules.
- Most ex parte communications are oral and most are not disclosed publicly. A handful of state agencies, primarily in hotly-contested arenas of natural resources and energy, have rules and practices in which officials disclose their private conversations.
- Most ex parte communications are initiated by stakeholders.[12]

Informal Rulemaking: What It Is and How It's Done

Informal Rulemaking is the process by which executive branch agencies develop the regulations and specific details, rules and standards to implement broad policies enacted by the Legislature. When the Legislature, for example, enacts tougher water quality standards, the rulemaking process develops the list of contaminants and allowable safety levels. The process is governed by rules of the California Administrative Procedure Act enacted in1945. California state agencies propose an average of more than 700 rulemaking packages annually.

Examples of Regulations created by Informal Rulemaking

- The California Air Resources Board Cap and Trade program: The executive branch designed it to implement a legislative mandate to reduce greenhouse gas emissions that contribute to global warming.
- The Department of Toxic Substances Control Safer Consumer Product Regulations: The executive branch designed them to implement legislation requiring lower concentrations of toxic ingredients in consumer products.

The steps in Informal Rulemaking

- The Legislature passes and Governor signs statutes which contain broad policy mandates, which executive branch agencies must interpret and craft into more detailed regulations or rules.
- The agency gathers input from stakeholders and government sources to assess the potential scope of a proposed rule.
- The agency files a formal Notice of Proposed Rulemaking outlining the subject and text of the proposed rule. This starts a one-year clock to adopt the rule.
- The agency conducts a public hearing on the proposal and takes written comments during a 45-day period.
- If the agency makes substantial changes as a result of comments it mails a Notice of Proposed Changes and provides another 15-day comment period.
- The agency adopts the regulation and sends it to the Office of Administrative Law for approval.

Sources: Office of Administrative Law. "The Regular Rulemaking Process." http://www.oal.ca.gov/regular_Rulemaking_Process.htm. Also, Little Hoover Commission. *"Better Regulation: Improving California's Rulemaking Process."* October 2011. Pages 8-10. http://www.lhc.ca.gov/studies/209/Report209.pdf.

California State Agencies: Few Have Ex Parte Rules

During its review the Commission learned that only a handful of California state agencies have rules regulating ex parte conversation. Only a few also impose disclosure requirements on private conversations held during informal rulemaking and quasi-legislative or quasi-judicial matters. Most of these agencies, boards and commissions regulate in the fields of energy, the environment and natural resources – areas of great complexity monitored by numerous stakeholders and powerful interest groups. As a result, these stakeholders and interest groups are vitally interested in what the others are communicating to appointed and elected officials.

"It's fair to say all sides are worried that all the other sides are having ex parte communications," said Michael Strumwasser, a March 2015 Commission witness retained by the CPUC to update its ex parte rules.

The rules governing ex parte communications within California state government originate in the state's Administrative Procedure Act (APA) drafted by the California Judicial Council and enacted on June 15, 1945. The act was amended in 1947 and 1979, and was again updated in 1995 through SB 523 (Kopp), following a seven-year study by the California Law Revision Commission.

The California APA explicitly prohibits ex parte communications during judicial-type proceedings conducted at state agencies.[13] But it is silent on ex parte communications in informal rulemaking and quasi-judicial or hybrid proceedings. This silence has enabled state agencies to set their own rules. Most, consequently, have no rules, policies or restrictions for private oral communications with interested parties during rulemaking and policymaking. A few agencies – the University of California Board of Regents, Board of Equalization and California Public Utilities Commission – won exemptions in 1995 from being covered by the APA.[14]

Similarly, the federal Administrative Procedure Act, adopted in 1946, is silent on ex parte communications during informal rulemaking. Like California, federal agencies have a variety of policies and rules that in some cases welcome ex parte communications and in others discourage or even refuse them.

Here is a snapshot of California agency rules and policies regarding ex parte communications:

California Public Utilities Commission: The CPUC adopted its current ex parte rules and practices on July 31, 1991, after a process of public participation and comment.[15] The CPUC conducts three types of proceedings: adjudicatory, quasi-legislative and rate-setting, each with its own ex parte requirements. Some of these proceedings' categories blend into one another, creating gray areas and opportunities for controversy. Among the rules in place at the CPUC:

- Ex parte communications are prohibited in adjudicatory proceedings, where enforcement actions, complaints and investigations are resolved.
- Ex parte communications are mostly allowed with no restrictions or reporting requirements in matters of rulemaking or quasi-legislative proceedings, such as considering whether to revise regulations regarding safety of utility infrastructure.

Lawmakers Consider Bill to Restrict Ex Parte Conversations at the CPUC

The 2015-2016 legislative session has featured debate on a flurry of proposals to toughen ex parte rules for quasi-legislative and other proceedings at the California Public Utilities Commission. As of June 2015 these proposals are largely contained in one bill, which passed the Senate on June 2, 2015 and awaits consideration in the Assembly.

The bill, SB 660, by Senator Mark Leno, D-San Francisco and Senator Ben Hueso, D-San Diego, proposes several new restrictions and conditions on ex parte communications at the commission:

- Ex parte communications in quasi-legislative matters, currrently allowed without restrictions, are reported within three days.
- Responsibility to report both allowed and prohibited ex parte communications is on CPUC decision-makers.
- New rules for handling prohibited ex parte communications at the CPUC.
- Unspecified fines and imprisonment for violations of ex parte communications rules.

Source: SB 660. Legislative Information Service. Senate Floor Analysis. http://lisprdweblb.calegis.net:7010/LISWeb/faces/bills/bill_search_results.xhtml.

- Ex parte communications are permitted with restrictions and reporting requirements in ratesetting proceedings. Oral ex parte communications are permitted at any time by any commissioner, as long as all interested parties are invited and given no less than three days public notice. The responsibility to disclose is on the stakeholder.[16]

The CPUC, as noted earlier, retained Mr. Strumwasser to revise its ex parte rules in the wake of controversy regarding allegedly illegal and unreported private communications between officials and regulated utilities. In written testimony Mr. Strumwasser explained, "There appears to be a widespread recognition that the Commission has lost public confidence in the fairness and independence of its regulatory actions and in the ethical behavior of its officials. There seems to be a sense that the path to restored public confidence lies in increased transparency and accountability."

On June 22, 2015, Mr. Strumwasser announced his findings in a report proposing tighter restrictions on CPUC ex parte practices. Those included a new ban on ex parte contacts in ratesetting proceedings and mandatory detailed disclosure of ex parte communications in quasi-legislative proceedings. Responsibility to disclose would be on the CPUC decision-maker.[17]

State Water Resources Control Board: The state's water boards, which fall under provisions of the APA, modified and loosened their ex parte practices on January 1, 2013, following passage of SB 965 (Wright). Lawmakers enacted the bill in the wake of Little Hoover Commission recommendations made in its January 2009 report, *Cleaner Water, Cleaner Structure: Improving Performance and Outcomes at the State Water Boards.* The report recommended allowing more ex parte contacts between water board regulators and the regulated to foster more two-way communications in decision-making processes.

Rules currently in place at the board:

- Ex parte communications are prohibited in adjudicatory proceedings.
- Ex parte communications are allowed in legislative-type proceedings.
- Ex parte communications are generally allowed, but require disclosure in hybrid proceedings "such as the issuance of certain general permits."[18]

California Energy Commission: The CEC falls under provisions of the APA. Its policies state:

- Ex parte communications are generally prohibited during adjudicatory proceedings which at the CEC primarily focus on power plant siting.[19] Although subject to narrow exceptions set forth in the APA, no comments can be made to a decision-maker unless in a public meeting or written in the public record.
- Communications outside public meetings are allowed in general policymaking and rulemaking issues, which are the majority of the Commission's activities. The CEC does not require disclosure of those oral conversations, but does attempt to include all factors relevant to its decision-making in the public record.

California Air Resources Board: The ARB also falls under the APA. The board's policies state:

- Ex parte communications are prohibited in adjudicatory proceedings.
- Ex parte communications are allowed and encouraged in rulemaking and quasi-legislative proceedings. Generally, ARB board members disclose their ex parte contacts and the subject matter of communications during board meetings.[20]

California Coastal Commission: The Coastal Commission is exempt from the APA. Its rules, effective January 1, 1993, are established via the California Coastal Act of 1976 in the Public Resources Code. In general:

- Ex parte communications by stakeholders and interested persons with individual commissioners are prohibited unless they are disclosed. When disclosed, these communications are allowed in permit application cases, but not in enforcement cases.
- The law requires that ex parte communications that occur more than seven days before a hearing must be disclosed in writing.

Those that occur less than seven days before a hearing must be disclosed at the microphone during the hearing.

- Generally, no written materials should be sent to commissioners unless copied to all and also to commission staff.[21]

Considerable legislative activity continues to swirl around the specifics of ex parte policies at the commission. Enactment last year of AB 474 (Stone) added new requirements for disclosure. It makes coastal commissioners identify the person on whose behalf the communication was made and identify everyone present during the communication. It also requires a more complete description of the content, including all text and graphic materials provided to the commissioner.[22] The commission also considered a legislative proposal to allow property owners in pending enforcement cases to conduct ex parte communications with individual commissioners. In the face of widespread opposition by commission and coastal stakeholders, as well as a negative opinion from the California Attorney General's office, that proposal failed to gain traction.[23]

The Case that Ex Parte Communications Are Necessary for Governing

Months of controversy over oral and email ex parte communications between some CPUC members and the utilities they regulate have cast these communications in an unfavorable light and spurred moves to rein in ex parte communications practices. Michael Picker, appointed president of the CPUC in December 2014, noted as one of his first orders of business on January 15, 2015, that the commission had hired Mr. Strumwasser to "review best practices we should adopt that help enforce internal ex parte rules." He added, "We have also banned one utility, PG&E, from all ex parte communications."[24] A pair of state lawmakers also introduced legislation in 2015 to greatly broaden restrictions on ex parte communications at the CPUC. The bill, SB 660, which passed the Senate in June 2015 and awaits action in the Assembly, has fueled expert concerns that California may go overboard in banning or scaling back ex parte communications – and require public disclosure of conversations throughout state government and in the informal rulemaking process. Several communicated these concerns directly to the Commission:

"I am opposed to amending the APA (Administrative Procedure Act) to either prohibit oral ex parte contacts in rulemaking or to require that they be memorialized in memoranda," stated Mr. Asimow of the Stanford Law School in written testimony for the March 5, 2015, hearing.

The California Energy Commission's Mr. Oglesby wrote the Commission on February 3, 2015, expressing the CEC's hope that "proposals to add new ex parte restrictions to ratesetting proceedings should not encompass quasi-legislative proceedings as well."

Mr. Oglesby told the Commission, "We have seen no evidence of unfairness or bias under the existing public participation requirements that apply to quasi-legislative proceedings and believe that extending a solution identified for ratesetting proceedings would impede important policy discussions without creating any discernible benefit for the public."

Mr. Asimow and others told the Commission there is value for both sides of the conversation in private, off-the-record talks between regulators and interest groups. Mr. Asimow, in his March 2015 written testimony, stated: "Often the agency heads need to have conversations with stakeholders to help them understand the issues presented by a rulemaking. Realistically, the agency heads can't read through the voluminous comments filed by the public. They need to get a handle on the issues through informal discussion with outsiders. By the same token, stakeholders want and need to get their views across to the regulators in oral presentations. This is an inherent part of the political process."

Similarly, Commission witness Esa Sferra-Bonistalli, author of the 2014 Administrative Conference of the United States (ACUS) study, *"Ex Parte Communications in Informal Rulemaking,"* said at the Commission's March 2015 hearing, "I would say there's more good than bad in ex parte communications. I don't believe ex parte communications create unfairness in rulemaking."

In the 2014 ACUS study, Ms. Sferra-Bonistalli wrote, "Ex parte meetings foster relationships with agency personnel and may hold future value by revealing what the agency is thinking regarding the rulemaking or potential future agency actions. Ex parte meetings also help stakeholders craft better written comments in the future because they discover what the agency needs and wants to know. And for some public stakeholders, at the very least, it is still important to engage in ex parte meetings in order to show that it did everything possible to make its positions and interests known as part of the rulemaking. This is especially so for organizations representing collective interests."[25]

Mr. Asimow, Ms. Sferra-Bonistalli and other supporters of unrestricted ex parte communications have long cited a 1981 US. District Court of Appeals (District of Columbia Circuit) opinion by Chief Judge Patricia Wald. In the case of Sierra Club v. Costle, Judge Wald wrote:

> "*Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall … Furthermore, the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated."*

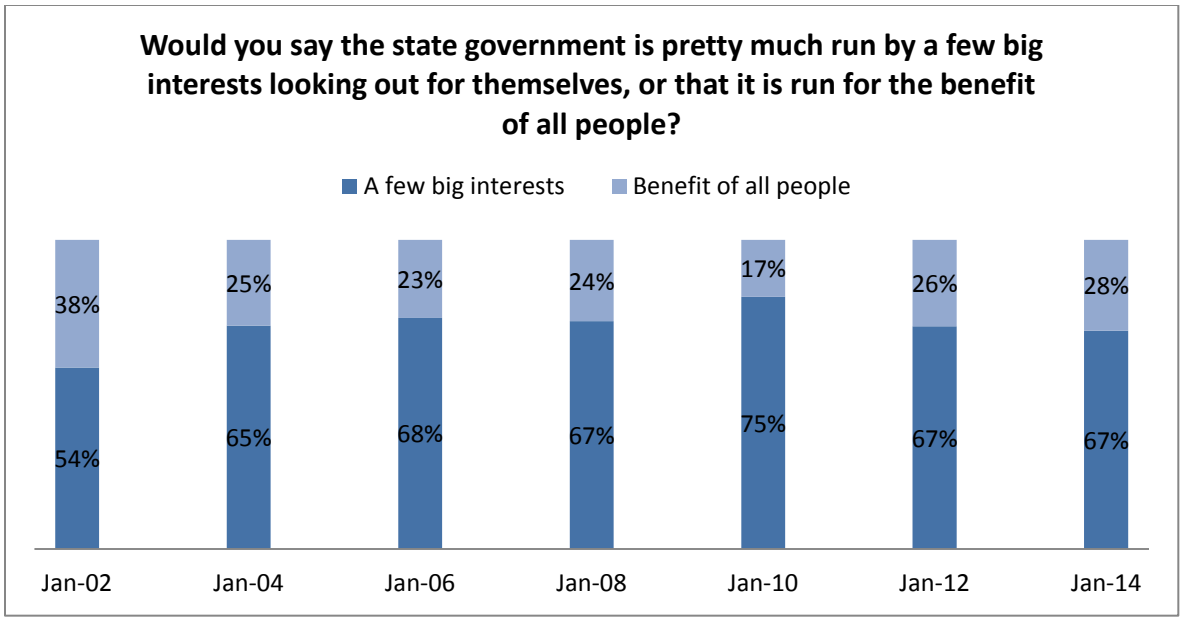
Mr. Asimow told the Commission that it would be going against the tide of established practice and opinion if it recommended new restrictions on ex parte conversations or additional disclosure requirements for informal rulemaking across the whole of the executive branch.

Likewise, Ms. Sferra-Bonistalli testified to the Commission that within the federal government there has been a retreat from 1970s sentiment favoring ex parte restrictions. Most of the ex parte practices still in use at federal agencies date from that time of acute concern and activism regarding government transparency and the perceived power of regulated interests. The Administrative Conference of the United States, a small federal agency that promotes efficiency, adequacy and fairness in federal regulatory procedures, adopted several recommendations in 2014 favoring the ability of regulators and the regulated to talk privately, including one stating: "Agencies should set a general policy encouraging or remaining neutral toward ex parte communications."[26]

The Case Against Unregulated Ex Parte Communications

Experts generally agree that the largely unlimited proliferation of private, off-the-record ex parte conversations throughout the executive branch of government is what gets things done and makes actions happen. But the Commission also heard during its review that private conversations between regulators and the regulated – and lack of disclosure of these conversations – contributes to a public perception that government processes are rigged to favor influential interests.

A December 2014 Public Policy Institute of California survey supports this contention. Findings showed that two-thirds of those surveyed agreed that "state government is pretty much run by a few big interests looking out for themselves" rather than for the "benefit of all the people."[27] The depth of this sentiment has proved consistent for more than a decade, according to the PPIC, and as shown in the chart on the following page.



Source: Public Policy Institute of California. *PPIC Statewide Survey: Californians and the Future*

During the Commission's review, representatives of the University of San Diego School of Law Center for Public Interest Law (CPIL) repeatedly advocated for limits on ex parte communications in the everyday work of the executive branch. In testimony, representatives of CPIL described ex parte communications as "concealed lobbying" that has caused advocacy efforts toward state government to become "increasingly and alarmingly imbalanced" in favor of the powerful.

"The fact that legislators operate in extreme ex parte license has infected the executive branch with a similar mindset," stated Mr. Fellmeth, executive director of the Center for Public Interest Law, in written testimony for the Commission's October 23, 2014, roundtable meeting on ex parte and open meeting act issues. Mr. Fellmeth told the Commission, "The agencies are divided into territories that correspond to the interests of specific economic-stake lobbies. They attend all meetings and are much involved in their own regulation – regulation intended and designed to constrain them *vis-à-vis* the general public. It is the latter that is the touchstone of a democracy. Our system properly separates the public domain from profit-stake interests."

At the Commission's March 2015 hearing, Mr. Howard, senior counsel for the Center for Public Interest Law, testified that "secret ex parte communications are among the most effective ways for powerful regulated interests to accomplish their objectives. This is because they can influence the opinions or bias the views of unelected and largely anonymous regulators and staff without the public, the press, or their

opponents ever knowing that the communications-lobbying has occurred."

Mr. Howard added, "In the absence of such knowledge, the press and the public cannot hold decision-makers fully accountable for the fairness and quality of their deliberations, and resource-strapped advocates who might oppose those interests in a matter won't know to re-direct their limited resources to do so."

Inside state government, a 2013 State Water Resources Control Board guide to ex parte communications warned board members about the possible negative impressions of their ex parte conversations: It stated, "Ex parte communications may contribute to public cynicism that decisions are based more on special access and influence than on the facts, the laws, and the exercise of discretion to promote the public interest."[28]

Mr. Howard specifically recommended that ex parte communications be limited throughout state government – particularly in the informal rulemaking process. He said private conversations with interest groups should stop after the agency files a formal Notice of Proposed Rulemaking, outlining the subject and text of the proposed rule and starting a one-year clock to adopt the rule.

"Once a rulemaking has begun that's like court. The agency should not allow ex parte communications," Mr. Howard told the Commission.

Disclosing Ex Parte Communications

Given the negativity sometimes associated with off the record and unreported conversations between interest groups and public officials, the Commission also reviewed the potential remedy of increased disclosure of these oral conversations. Presently, as noted earlier in this chapter, few state agencies have ex parte rules. The few with rules use a variety of approaches to disclosure. Those range from disclosing contacts orally at meetings to posting brief online accounts of ex parte conversations. Others, as noted in the snapshot of agency practices earlier in this chapter, require written communications be distributed to all commissioners or require notices that invite all stakeholders to an anticipated conversation. Many of these rules exist for those gray areas or hybrid situations that fall between informal rulemaking and adjudicatory proceedings.

The federal government, too, has a variety of disclosure practices. Ms. Sferra-Bonistalli noted that agencies such as the Department of Justice, Federal Emergency Management Agency, Federal

Communications Commission and others require written summaries of private ex parte communications with outside interests. Some agencies require the outside party to write the summary. Others put the responsibility to disclose on their own officials. The required timing to make those disclosures range from "promptly" to two or three business days or 20 calendar days after the communication. (See Appendix E for practices at 17 federal agencies).

As might be expected, there are a variety of issues and opinions about whether ex parte conversations within the state's executive branch should be disclosed. There are many questions, as well, about who should disclose the conversation and in what detail. Disclosure rules are an especially controversial sector within the larger issue of ex parte conversations, and recommendations received by the Commission from various experts will be discussed in more detail in the next chapter.

Changes for Effective and Open Governing

A modern administrative state with issues and complexities at the scale of California requires optimal governing processes to assure quality information gathering and decision-making by its thousands of officials. Maintaining a clean, open government that thwarts temptations toward corruption and favoritism also requires adhering to "sunshine" laws and policies that control open meetings, ex parte communications and access to public records.

Yet many officials working in state and local government and stakeholders who engage with them believe that a key plank of transparent government in California – its open meeting laws – works contrary to sustaining effective governing. Specifically, these interests have suggested to the Commission that it favor and promote new amendments to the state's Bagley-Keene Act and its local government equivalent, the Brown Act. Most contended in testimony and roundtable discussions that well-intentioned changes enacted to the Brown Act in 2008 – and the incorporation of those changes into the more complex administrative machinery of state government through the Bagley-Keene Act in 2009 – triggered unintended consequences. Those consequences, the Commission heard repeatedly during its 10-month study, impede information gathering and decision-making processes critical to running California.

The Commission agrees with that consensus.

Testimony, roundtable discussions and personal interviews show that 2009 Bagley-Keene Act and Brown Act changes have confused many of the state's appointed and elected officials and stirred widespread fear of legal violations. More, they have sowed such abundant caution that officials are afraid to talk with and learn from colleagues on boards, commissions and local elected bodies about even the most general policy issues. All point toward a governing problem that requires addressing.

Throughout the Commission's study, the California Newspaper Publishers Association, which sponsored the strict, broadly interpreted rules for conversations among appointed state officials, contended just the opposite. The CNPA maintained that the problem is not with the

acts, but with conservative interpretations of the acts by overly cautious state government attorneys. The California Attorney General's office in August 2014 also defended the current laws as workable for state agencies, stating, in the case of the California Public Utilities Commission specifically, "Comparatively less efficiency is the price commissioners must pay to afford the public a full opportunity to participate in its decision-making process."

"Each nonpublic or serial communication is a missed opportunity for the public to participate," Deputy Attorney General Ted Prim stated in an August 25, 2014, letter to the Commission.

Yet during the course of its study the Commission came to understand why state agency and local government attorneys continually steer their appointed and elected clients to the side of caution rather than risk in trying to comply with the post-2009 Bagley-Keene Act and post-2008 Brown Act. Given the broad legal interpretations of the acts, attorneys repeatedly told the Commission it is imperative that they shield their agencies' controversial, multibillion-dollar decisions from any possibility of legal challenges that use the open meeting act as an entry point.

At the state level, California Energy Commissioner Karen Douglas amplified this legal fear of conversing with agency colleagues in August 2014. She told the Commission, "What my attorney has told me many, many times is the more of that you allow, the more it's human judgment. It comes down to, 'Well what was that conversation about?' Suddenly you could have someone wanting to depose someone over what was that conversation about?" Describing the commonly-held agency view of the legal risks, she said, "Given the consequences, both reputational and for the work we do, and legal, and frankly in terms of the public's faith in government, to any sort of stumble I'm just going to say flat out … there's a limit I won't push beyond."

At the local level, Arts Council for Long Beach Board Member Sherry Diamond said the nonprofit's board members – when covered by the Brown Act because of their relationship with the city's redevelopment agency – were always unsure of their ability to discuss council policy among themselves. "We always felt we were in danger of putting ourselves on the wrong side of the law. It was very hard to stay on the good side of the law," Ms. Diamond said.

The Little Hoover Commission heard and has experienced itself similar cases of being constrained by confusion about what constitutes appropriate internal discussion or defines when a discussion should be considered a public meeting. A discussion or event attended by two members might legally be considered an internal discussion. But the

same event attended by three might require posting a public noticing of a meeting – even if three attendees are substantially less than a majority of the entire body and none of them are making decisions. In the case of an informational tour this raises logistical complications about how to find room for an unknown number of public attendees in a meeting moving from one location to the other. Whether an event should be considered a public meeting or not usually comes down to a state attorney's interpretation of the Bagley-Keene Act – and an entity's sense of the legal risks and possible public and media criticism. Many entities, the Commission heard during its study process, err firmly on the side of caution as described by Ms. Douglas and Ms. Diamond.

In the Commission's case, it has publicly noticed informational tours of a state prison facility and a public high school, establishing both as public meetings attended by just three Commissioners of a 13-member body. Neither tour involved decision-making. Another informational visit with judges was nearly cancelled when judges who wanted to speak freely to the Commission declined to come if it was a public meeting. The Commission resolved the problem by limiting attendance to two Commissioners, depriving other members of valuable first-hand judicial perspective. Such instances limit the ability of a state or local entity and its leaders to gather information in an informal setting. As a result, more of that information is gathered by staff, which filters it upward to the board, commission or elected body instead of being gathered directly by those appointed by the Governor and Legislature or elected by the people.

Minor modifications in statute language could handily clarify how to comply with the Bagley-Keene Act and the Brown Act in ways that honor their intent and allow officials leeway to make smarter policy.

A Need to Address Bagley-Keene and Brown Act Issues

The Commission, throughout its study, has maintained the importance of Bagley-Keene Act and Brown Act compliance as first among governing priorities. The Commission's witnesses equally asserted their beliefs in the primacy of strong protections for citizens to watch their government make policy and regulations in the open. In written testimony to the Commission, Mr. Fellmeth, executive director of the University of San Diego Law School's Center for Public Interest Law, affirmed the Commission's core belief:

> *"The underlying purpose behind the Bagley-Keene Act is to allow transparency to decisions as they are being made.*

> *The public (including the media) is able to see the debate or discussion, have some sense of the basis for the decision and to observe who voted which way. And there is opportunity to know in advance what subject matter will be decided so public comment can be obtained (both before and at the final decision-making meeting). In this way, a board not only solicits comments that may limit unintended consequences, but it also provides a crucial element of legitimacy, where the governed see the government intended to serve them as it acts."*[29]

In his August 2014 testimony, Mr. Fellmeth also further defined the issue of serial meetings, setting the stage for the Commission's inquiry into the alleged problem, discussion of possible solutions and the recommended changes in this chapter:

> *"A "meeting' does not occur with a conversation between two board members. But it is broadly interpreted and where a conversation between two concerning an aspect of board business that is then extended to a third, there can be a 'sequencing' of conversations (also called 'serial communications)' that amounts to a 'prearranged decision' in violation of the purpose of the BK Act. And such an ordering is particularly problematical with a small board or commission, in this case where a third person forms a determinative majority of three."*

The Commission fully supports the virtuous democratic intentions of the Bagley-Keene Act and the Brown Act. Yet it cannot support the unintended consequences that seem to have arisen with its most recent amendments. The 2009 and 2008 changes enacted by the Legislature and signed by Governor Schwarzenegger appear to be ripe, by most accounts provided to the Commission, for fixing.

"There needs to be a serious relaxation of Bagley Keene so that the members of agencies can engage in uninhibited discussion of important management and policy issues (without making final decisions on them)," the Commission heard in March 2015 from Mr. Asimow of Stanford Law School.

"Free us up," said Concord City Councilmember Edi Birsan during a May 2015 Commission advisory committee meeting on the Brown Act. "We understand the problems of smoke-filled rooms. We've got to be able to deal with this in a manner where we are the educated people and discuss things among ourselves rather than third parties such as lobbyists."

"The sensible resolution of this issue, as with many issues, is to follow the wisdom of Aristotle, 'moderation, moderation in all things,'" added Mr. Fellmeth in August 2014 testimony to the Commission.

A Range of Possible Solutions

The Commission, indeed, heard and considered a variety of seemingly moderate solutions to enhance governing while maintaining transparency. Ideas ranged from returning to the older statute language that required the avoidance of internal consensus on an upcoming vote or decision to adding a few words to the current statute to add greater legal clarity regarding the two words "to discuss." Some of those ideas applied throughout the breadth of state and local government, while others focused more narrowly on complicated full-time multi-member agencies such as the CPUC.

In the case of the CPUC, Michael B. Day, partner with the San Francisco legal firm of Goodin, MacBride, Squeri & Day, Inc., recommended with five other representatives in March 2015 testimony, that the Legislature add specific language to the Public Utilities Code – "to clarify that a discussion between Commissioners and advisors of the merits of a proposed decision, ruling or order of the CPUC does not constitute a collective concurrence in violation of the Act, so long as the Commissioners do not disclose or commit to their decision or intention to vote a particular way on an item."[30]

Mr. Day told the Commission that the Legislature could add similar language to the Government Code to apply more generally to other state agencies, boards and commissions. Essentially, the proposed language (see Appendix F) states that, "A discussion by a member of the commission of the merits of any item of business within the subject matter jurisdiction of the commission …. does not constitute a collective concurrence if the member of the commission does not disclose his or her decision or intention to vote on the item." The same kind of language is easily transferrable to local government through a small change in the Brown Act.

Mr. Fellmeth proposed a similar short amendment to the Public Utilities Code at the Commission's August 2014 hearing.

> *"11122.5 (b) (2) Where an agency is governed by a multi-member board or commission of full-time employed persons whose duties include administrative agency functions, such members and their intermediaries may communicate among themselves as to background or general information concerning the subject matter of the agency's jurisdiction*

> *and as to logistical arrangements relevant to allocation of workload, scheduling, and related organizational issues. However, those communications shall not propose, advocate, or comment upon the merits of any substantive decision pending before the agency."*

In written testimony to the Commission, he stated that the new language, specifically as related to the CPUC, "would seem to preserve the substantive purposes of the Bagley-Keene Act, while recognizing the somewhat more compelling need of this agency to coordinate its operations between the offices of the five commissioners."

With minor revision this language also might be generally adapted with different words to the Government Code for other state agencies and local government entities.

The California Energy Commission's Mr. Oglesby wrote the Commission on February 26, 2015, proposing two options to allow limited types of communications between members of a state entity outside open meetings:

- "For example 'item of business' could be defined as any issue that will be coming before the state body for a vote within a specified period of time.
- The second option is to add a specific exemption to subdivision (b)(1) of Section 11122.5 to permit discussions of general policy nature or those necessary to carry out the state body's executive functions."

Mr. Oglesby told the Commission that either option "would make intra-agency coordination and administration more efficient, while not impinging on the right of the public to participate in Commission proceedings."

Representatives of First Amendment and media interests said, however, they remain unconvinced that the Bagley-Keene Act and the Brown Act require modification. Open meeting act legal experts from the California Newspaper Publishers Association, Californians Aware and the First Amendment Coalition expressed reservations at nearly all of the Commission's public hearings and meetings about new statute language to permit general discussions among appointees to boards and commissions and officials elected to local entities so long as they don't reach a collective consensus on upcoming votes or decisions.

All said it can be difficult for participants to tell the difference between a substantive and a non-substantive conversation and for outsiders to effectively police such conversations for the larger public interest.

"Where do you draw the line," asked the CNPA's Mr. Ewert at the Commission's May 28, 2015, roundtable discussion on the Brown Act.

Michael Lauffer, general counsel of the State Water Resources Control Board, acknowledged to the Commission that it can become difficult for appointed state commissioners or board members "to self-police." He said one option, however, is to have the agency's counsel present at the internal discussions and keep confidential minutes which would be available to the courts in the event of a legal challenge.

Suggestions from Present and Former CPUC Commissioners

Public Utilities Commissioner Michael Florio told the Commission at its August 2014 hearing that returning to the pre-2009 Bagley-Keene Act language represented a possible alternative. That language simply prevented private communications designed to achieve concurrence on upcoming decisions, instead of preventing any internal discussions by a majority of the body. Mr. Florio testified that CPUC commissioners need a communications mechanism to gather background and educate themselves on issues outside of formal meetings.

"That does not mean that we should have 'secret backroom deals' or other collusive practices," he testified, "but the old rule against 'collective concurrence' was sufficient to ensure that did not happen.

"The better alternative in my view would be to return to the prior provisions of Bagley-Keene that banned only "collective concurrence" among the commissioners outside of a public meeting and allowed communications among commissioner advisors as long as no such concurrence was formed," Mr. Florio said.

The Little Hoover Commission also reviewed a suggestion made by former CPUC Commissioner Mark Ferron in his Final Commission Report on January 16, 2014. Writing before the Little Hoover Commission began studying the state's open meeting acts, Mr. Ferron proposed that the CPUC try a new approach to work within the restrictions of the Bagley-Keene Act. Mr. Ferron stated in his final report:

> *"My colleagues and I have discussed arranging ourselves similarly in the way that a Board of Directors is organized in corporate America: We could create subcommittees dedicated to overseeing important internal issues like Audit, Budget,*

> *Personnel, External Relations, and Safety. These two-Commissioner subcommittees would meet regularly with senior directors and staff to provide strategic direction and would report on progress and seek policy direction from all five Commissioners on a regular basis. This arrangement could help give the Commissioners a more effective senior-level oversight without violating Bagley-Keene and I believe would create a stronger and more effective agency."*

The Attorney General's Office, in a 2014 conversation with the Commission, said Mr. Ferron's idea was worth discussing as a way to ease the CPUC's difficulties with the Bagley-Keene Act. The Attorney General's Office said two-member CPUC subcommittees would not exist as a quorum, but could report to the full Commission. While it would require further legal analysis, "It's not out of the realm of possibility," a representative of the office said.

Other Suggestions: More Frequent Use of Public Meetings

Defenders and sponsors of the Bagley-Keene Act 2009 changes and 2008 Brown Act changes suggested during the Commission's study process that more frequent public meetings might address state and local agency concerns about the inability to discuss issues among themselves.

Peter Scheer, executive director of the San Rafael-based First Amendment Coalition, said during a 2014 telephone conversation with Commission staff that one solution to the CPUC's difficulties, in particular with the Bagley-Keene Act, might be more commission meetings. "They work 40 hours a week. What's to prevent them from having a meeting every morning?" he asked.

A representative from the California Attorney General's office, also taking part in the call, noted that each daily meeting would require its own 10-day notice. Replied Mr. Scheer: "There is a possible obstacle in the 10-day notice. Maybe there are creative ways to address that and hold meetings to their hearts content."

The idea of more frequent public meetings for appointed and elected officials to discuss policy issues also arose during the Commission's advisory committee meetings.

Mr. Lauffer told the Commission that since the 2009 amendments to the Bagley-Keene Act the State Water Resources Control Board "has gone to more public workshops before decision-making. Over time the meetings, which identify broad priorities, have been more effective," he said. Mr. Lauffer told the Commission the workshops have created an arena

for collective dialogue to discuss broad and organizational issues. He said members feel more comfortable discussing these issues in a public workshop setting. The meetings are publicly noticed.

As noted in the first chapter, the California Coastal Commission added an item on its agenda each month for commissioner comments – a venue in which Commissioners discuss issues among themselves in public. Coastal Commissioner Mary Shallenberger, in an August 25, 2014, letter to the Commission, also described the commission's routine public briefings and workshops where commissioners learn about and discuss larger policy issues. Commissioner Shallenberger said the sessions are well attended by stakeholders, broadcast on the Web and are "an excellent demonstration of conducting public policy discussion in an open, transparent and public manner."

At the Commission's October 2014 advisory committee meeting, J. Jason Reiger, assistant general counsel at the CPUC, suggested a similar discussion forum in written form: scoping memos for discussion among commissioners prior to the public process of decision-making. The scoping memos would give commissioners flexibility to collectively discuss what information is needed to set the right policies, he said.

California Should Adjust its Open Meeting Acts

The Commission agrees that it is difficult to draw the line between informal private conversations among decision-makers about general policy issues and informal conversations that casually, illegally drift toward consensus. Testimony from hearing witnesses, discussions among experts at advisory committee meetings and staff conversations with attorneys, academics and government officials showed that no one knows precisely, or at least legally, how to draw that line to produce both optimum public access and effective governing.

It is unfortunate then, but perhaps inevitable that changes made to the state's open meeting laws for the noblest of reasons have triggered consequences not anticipated by their authors. Designed to protect the public from the most egregious practitioners of secret government, they have tied the majority of appointed and elected officeholders in knots as they try to learn about important issues and make quality decisions. Public attorneys who might have helped them unravel those knots have instead advised a general caution so extreme that those who step up to govern California say they are afraid to talk to one another or even be seen together beyond public meetings.

Upon hearing city council members outline for the Commission the intricacies of governing cities while navigating Brown Act constraints, the CNPA's Mr. Ewert, who led the 2008 legislative effort to change the Brown Act, acknowledged, "The Brown Act isn't perfect. I'll admit that. It is the result of a lot of political hands at work." Yet the organization and other First Amendment interests have insistently maintained that the law itself, as currently written, is not the problem and have pledged to fight new attempts to amend it.

The CNPA, which also sponsored the 2009 changes to the Bagley-Keene Act, has stated throughout the Commission's study process that the state's open meeting laws *do* allow informal conversations between less than a majority of an appointed or elected body. The organization has similarly, and understandably, criticized the narrow interpretations of its legislative intent by government attorneys fearful of open meeting act lawsuits.

Nonetheless, these legal interpretations and all the other consequences described in this report have become an undeniable part of the California landscape. The Commission's long examination of the state's open meeting acts clearly shows that perception of the open meeting acts by public officials and their attorneys is reality. Reality cannot be argued away by saying the laws aren't broken or that office holders always have complained about being constrained by open meeting laws.

A reconsideration is in order.

The Commission also is concerned about the abuses of public commenting opportunities it learned about during its May 28, 2015, advisory committee meeting with city councilmembers and other officials throughout California. This element of the Brown Act requires additional review with much broader input from local public officials before any comprehensive recommendations can be determined. The Commission suggests that the point made by Los Angeles City Councilmember Robert Blumenfield that neither the Legislature, nor the courts would tolerate the abuse that many city councils and other local entities receive from people in open meetings is valid.

Among the comments received in the Commission's anonymous December 2014 survey on the Brown Act, one respondent suggested that the League of California Cities or California State Association of Counties put together a working group to take a fresh look at these kinds of issues and recommend a way forward. The Commission believes this would be well worth doing.

Addressing the State Ex Parte Landscape

For more than 70 years in the executive branch of state and federal government, decision-making has steadily moved away from judicial-type processes that involve parties making their cases and cross-examining one another before administrative law judges or hearing officers – and toward deliberative processes resembling to some degree those of the legislative process. This new landscape of administrative decision-making is best known as a "quasi-legislative" process or "informal rulemaking."

In March 2015, Commission witness Michael Strumwasser described this quasi-legislative process and informal rulemaking in a simple sentence: "The core of the process is a notice-and-comment procedure whereby the agency promulgates a draft recommendation and supporting material, the public is afforded an opportunity to comment, the agency makes any changes in response to the comments, and the agency then may adopt the regulation, which is reviewed by the Office of Administrative Law for legal sufficiency."

What fuels this executive branch decision-making – in much the same way it fuels the legislative process – is frequent, largely unreported ex parte contacts between government agency officials and representatives of the interests they regulate. As noted earlier, California's Administrative Procedure Act is silent on the question of ex parte communications in informal rulemaking and allows agencies to set their own rules. Most have none.

These ex parte contacts testify to the political nature of state government rulemaking. Mr. Asimow described it as follows in March 2015 testimony to the Commission:

> *"Rulemaking is a political process that calls for making hard choices and difficult compromises. The interests—often vital interests—of the general public and of regulated parties are at stake. Making rules calls for the exercise of wisdom and discretion and often the tradeoffs involved are quite political in nature. For examples, rules frequently trade off public environmental benefits against business costs. Drawing these kinds of lines is an inherently political process."*

The Commission considered during its study whether the benefits of closed-door meetings between government and regulated interests outweigh the drawbacks. The benefits are clear: an unfettered flow of

information that helps interest groups make their cases and public officials learn from experts about the arenas they regulate. The drawbacks are equally clear: an appearance of impropriety and public cynicism that the administrative process is rigged in favor of influential interests with time and money on their side.

Recent months have brought widespread media attention to the drawbacks – in particular, to ex parte contacts between major California utilities and the California Public Utilities Commission. The CPUC controversy played out during much of the Commission's review of open government issues in California. Allegations that CPUC officials conducted frequent private, unreported and illegal ex parte contacts with large energy companies have spurred the legislation described earlier in this report, SB 660, to clamp down on ex parte practices and rules at the agency. By implication, this has called into question the ex parte practices at all state agencies

The Commission heard an abundance of views regarding ex parte contacts during quasi-legislative proceedings and rulemaking during its study process. The most common refrain from state and federal experts, practitioners and state agency officials was to leave the rules that currently govern them largely intact.

"The recent controversy regarding ex parte communications appears to stem almost entirely from violations of those existing rules," testified Mr. Day and his five co-signers at the March 2015 hearing. "Accordingly, our recommendations in the area of ex parte rules focus on improving the application and enforcement of the existing framework of ex parte rules, rather than banning ex parte communications generally."[31]

The California Energy Commission's Mr. Oglesby expressed similar sentiment in a February 26, 2015, letter to the Commission. Mr. Oglesby stated, "Because these quasi-legislative proceedings already have sufficient protections in place to provide public access and participation, and because of the importance in ensuring open channels of communication for information gathering, ex parte restrictions would impose unnecessary burdens in these proceedings without improving fairness or impartiality."

"… Agency heads should be free to seek policy or even political advice from anyone they choose, inside or outside of the government," Mr. Asimow testified to the Commission in March 2015. "Lobbying is acceptable because it is so valuable to stakeholders and to the agency itself. So long as the resulting rule meets the standard of reasoned decision-making and is supported by the rulemaking record, it should

not be overturned by a court, even if extensive undisclosed lobbying took place during the rulemaking process."

Added Ms. Sferra-Bonistalli in March 2015 testimony, "Ex parte communications cannot truly be prohibited or avoided. Ex parte communications will occur, at least unknowingly, from within and outside the agency regardless of agency policy."

Commission Support for Expert Consensus

The Commission supports this expert consensus. If Californians embrace the concept that they live in an administrative state and expect their administrative agencies to act as quasi-legislative bodies, the agencies should be open to input and outside perspective – same as the Legislature. A wide-ranging limitation of ex parte communications throughout state government would negate nearly seven decades of agency practices and California Administrative Procedure Act silence on the issue – as well as run against the grain of leading opinion on the issue in the states and in the federal government. Worst perhaps, it could contribute to the same unintended governing consequences as those just described regarding the Bagley-Keene Open Meeting Act and the Brown Act.

The Commission considered such consequences at the State Water Resources Control Board in its January 2009 report, *Cleaner Structure, Cleaner Water: Improving Performance and Outcomes at the State Water Boards.* The report noted that strict prohibition against ex parte communications at the agency had the effect of making board members "unapproachable," as well as the unintended consequence of undermining stakeholder confidence in the board's regulatory system. During the study, people said the strict ex parte rules at the water board and its nine regional boards limited "regulated entities' ability to discuss important and complex issues with board members." The Commission's report stated: "Instead, local governments, businesses and other stakeholders are often limited to just a few minutes of testimony before the board during a formal hearing, despite the profound fiscal impact board decisions can have on these regulated entities."

The Commission, noting that the strict rules had sowed lack of trust in the water board and lack of understanding of why it made its decisions, recommended that the board and its regional bodies adopt the less stringent rules used by other state agencies "that allow for communication between regulators and the regulator as long as they are disclosed in a public meeting."

Subsequent legislation enacted in 2012 – SB 965 (Wright) – eased the rules to allow ex parte communications about issues concerning certain pending general orders of the water boards. The legislation also imposed disclosure requirements on stakeholders who initiate certain ex parte communications, requiring them to describe the substance of the communications, identify all participants and include all materials used during the meeting. Board members also report their contacts with regulated entities at public meetings.

Mr. Lauffer, general counsel of the State Water Resources Control Board, explained the *why* behind the new rules and disclosure landscape to board members in an April 25, 2013, memo: "Essentially, ex parte rules allow everyone to know and, if desired, rebut the information upon which the water boards make decisions before they make their decisions. The rules are also intended to ensure that all board members have a common record upon which to make their decisions and that a court will be able to ascertain the bases for such decisions."[32]

A Middle Ground: More Disclosure of Ex Parte Communications

While the Commission does not propose new limits on ex parte communications on quasi-legislative proceedings throughout state government, the water boards offer an example and alternate route of potential reform. The Commission believes the ease and convenience of digital technology highlights such pathways for additional transparency.

During the Commission's study process no group advocated harder than the University of San Diego School of Law Center for Public Interest Law for limiting ex parte communications throughout the executive branch of state government. But short of that, representatives of the center also advocated for more public reporting and disclosure of private, off-the-record conversations between outside interests and executive branch officials.

Mr. Fellmeth contended to the Commission that, at the very least, if policymakers oppose limiting ex parte conversations, more of these communications should be disclosed electronically to give all involved in a policy change the ability to rebut or counter arguments made in private conversations with decision-makers.

Disclosure is a frequently-advocated reform for ex parte communications practices. Ms. Sferra-Bonistalli also told the Commission, "I urge disclosure in lieu of restrictions. A posture of welcoming ex parte communications and a policy of disclosure can maximize the benefit while minimizing the potential harms of ex parte communications."

The Commission heard from many that digital technology makes it easier than ever to post a quick online summary of a private meeting. Participants in conversations – in which responsibility is typically on the stakeholder – can simply type a quick record of the engagement and send it to the agency for posting. Emails can be posted at an online central index, as can replies and rebuttals from other stakeholders.

The Center for Public Interest Law's Mr. Howard told the Commission, "The disclosure doesn't have to be onerous. Here's what you need: Who did I meet with? When? What was the agendized item? What was the position argued? But the actual position or arguments made is less important than documenting that the meeting happened," he said.

In written testimony to the Commission in March 2015, Mr. Howard stated CPIL's general case for more disclosure:

> *"Done sensibly, disclosure – openness generally – works to restore confidence in government because it does in fact have a salutary, anti-corrupting impact on the operations of government. It also lends balance to the information-gathering of decision-makers by alerting advocates that their voices are needed as a counter-weight in this or that proceeding or with this or that regulator. It also does not dissuade lobbying, as if lobbying could be dissuaded, and has no impact on legitimate, policy-based arguments as there is no reason to be ashamed of such positions, or a need to cloak them in secrecy. In fact, if the argument is a good one, the person communicating it should want disclosure to better hold the decision-maker accountable if the good argument is not heeded."*

Mr. Day likewise testified to the Commission in support of better disclosure as an alternative to banning ex parte communications. Mr. Day and his five co-signers singled out CPUC disclosure procedures in particular. They called for more substantive accounts of conversations between CPUC officials and those they regulate. Mr. Day told the Commission at its March 2015 hearing, "In many cases such notices are filed with only a general description of the subject matter of the contact. Other parties are not able to respond to a particular argument or issue because the notice is far too vague about the content of the communication."

Mr. Day suggested that the CPUC amend its rules to require that stakeholders file a supplemental disclosure if the agency deems that the original notice lacked appropriate substance.

"We suggest that the CPUC specifically require that ex parte notices regarding oral communications should provide a full summary of the advocacy that occurred during the ex parte contact, including a list of the principal arguments or points made to the regulator(s)," he testified to the Commission. Mr. Day also told the Commission that such changes would require extensive "policing" by the CPUC and other stakeholders for maximum effectiveness.

Rules requiring more substantive reporting by stakeholders on their discussions with executive branch officials during quasi-legislative proceedings could apply far beyond the CPUC and be adopted by any state agency.

Other Views: The Challenges of Disclosure

The Commission heard extensive criticism of additional disclosure requirements and recognizes that attempts to bolster these requirements will likely meet resistance from powerful interests. One expert contends, for example, that additional disclosure rules will add to existing state agency responsibilities and stretch staff resources. In written testimony to the Commission, Mr. Asimow stated, "Because I believe that California already overregulates the adoption of regulations, I oppose any additional restrictions on the rulemaking process, such as by requiring agencies to prepare memoranda on all oral ex parte communications between agency officials and stakeholders.

"Such a requirement would increase agency workloads," Mr. Asimow told the Commission. "Either agency personnel must write summaries of their discussions with stakeholders or, if the memoranda are prepared by stakeholders, agency staff members have to read them carefully to make sure they are accurate and complete. This would be just one more time-consuming step necessary to get a regulation out the door."

Mr. Asimow also told the Commission that disclosure requirements might inhibit the free flow of information between regulators, the regulated and other stakeholder groups – a position also expressed by California Energy Commission officials. Mr. Asimow stated in March 2015 testimony, "A requirement that all outsider policy advice to the agency heads must be recorded in a memorandum and included in the record would often discourage people from furnishing the advice and the agency heads from seeking it. Or it would inhibit the candor with which views are expressed in a private meeting. Or, as already pointed out, the memo that summarizes such conversations will conceal far more than it reveals.

"We recognize an agency shouldn't be required to disclose the content of all staff communications to the agency heads, because this would discourage the staff from furnishing candid policy advice. For the same reason, there should not be a blanket requirement that stakeholder communications with agency heads be disclosed," stated Mr. Asimow.

Resistance to Disclosure from Lobbyists

Mr. Howard testified to the Commission with a specific example of resistance that can be expected and which he encountered from regulated interests in 2008 when working on a disclosure bill, SB 963 (Mark Ridley-Thomas). The legislation proposed that advocates and lobbyists disclose their ex parte conversations with boards and commissions housed within the Department of Consumer Affairs. Mr. Howard said approximately 50 lobbyists for trade associations and licensed professionals that frequently interact with the Department of Consumer Affairs opposed the legislative effort during his first outreach session.

"The language was eventually stripped from the bill," he told the Commission in written testimony. "Preceding this, a slate of regulatory boards – ironically, lobbied ex parte – began taking opposing positions on the bill owing to the ex parte provision."

"It was a nonstarter," Mr. Howard told the Commission, summarizing one lawmaker's attempt to require disclosure of ex parte communications in just one corner of state government. "They (trade associations) saw no advantage in a new policy. They can do what they want now."

The Little Hoover Commission itself encountered widespread reluctance from trade associations and lobbyists it contacted to publicly discuss or testify about ex parte communications or disclosure issues.

In light of the widespread interest and concerns about transparency issues throughout California, the Commission makes the following recommendations to defend public access to its governments while ensuring that those who govern have the tools to effectively do so:

Recommendation 1: The Legislature should adopt new language to various state government codes to clarify that appointed officials of state boards and commissions can hold informal internal discussions among two or more members about general policy issues related to their work so long as the discussions are not used to develop concurrence or consensus on an upcoming vote or decision in violation of the Bagley-Keene Open Meeting Act.

Recommendation 2: The Legislature should adopt new language to various state government codes to clarify that local elected officials and their appointees to local and regional government bodies can hold informal internal discussions among two or more members about general policy issues related to their work so long as the discussions are not used to develop concurrence or consensus on an upcoming vote or decision in violation of the Ralph M. Brown Act.

Recommendation 3: A working group led by trade associations such as the League of California Cities, California State Association of Counties, California Special Districts Association and California School Boards Association should consider a fresh legal approach to maintaining decorum and policing public comment during open meetings – in line with that employed by the Legislature – that will help rein in abuses by some members of the public.

Recommendation 4: The State of California should retain all existing executive branch policies that ban ex parte communications in adjudicatory proceedings. The state also should retain its current array of ex parte policies that provide useful information to executive branch decision-makers and govern a variety of quasi-legislative proceedings, quasi-judicial proceedings and a variety of hybrid proceedings with consideration as to additional transparency and accountability.

Appendices & Notes

- ✓ ***Public Hearing Witnesses***
- ✓ ***Little Hoover Commission Public Meetings***
- ✓ ***Results from Brown Act Survey of 271 Elected Officials from Local Government and Special Districts***
- ✓ ***Views of Elected Officials on Brown Act Compliance: A Sampling of Opinion***
- ✓ ***Ex Parte Practices of Selected Federal Government Agencies***
- ✓ ***Suggested Language to Amend Bagley-Keene Open Meeting Act***
- ✓ ***Notes***

Appendix A

Public Hearing Witnesses

Public Hearing on the Bagley-Keene Open Meeting Act
August 26, 2014
Sacramento, California

Karen Douglas, Commissioner, California Energy Commission

Jim Ewert, General Counsel, California Newspaper Publishers Association

Robert Fellmeth, Executive Director, Center for Public Interest Law, University of San Diego School of Law

Michel Florio, Commissioner, California Public Utilities Commission

Michael J. Levy, Chief Counsel, California Energy Commission

J. Jason Reiger, Assistant General Counsel, California Public Utilities Commission

Public Hearing on California's Open Meeting Acts
March 5, 2015
Sacramento, California

Michael B. Day, Partner, Goodin, MacBride, Squeri & Day, LLP

Edward Howard, Senior Counsel/Senior Policy Advocate, Center for Public Trust Law, University of San Diego School of Law

Esa L. Sferra-Bonistalli, Consultant and former federal agency Liaison Representative to the Administrative Conference of the United States

Michael J. Strumwasser, Partner, Strumwasser & Woocher, LLP

Appendix B

Little Hoover Commission Public Meetings

Advisory Committee Meeting on
Fine-Tuning Transparency Rules for Government Decision-Making
October 23, 2014
Sacramento, California

Jaclyn Appleby, Chairman Horton's Office, California State Board of Equalization

Vicki Bermudez, California Nurse Association

Damien Brower, City Attorney, City of Brentwood, Member of the League of California Cities Brown Act Committee

Faith Conley, Legislative Representative, California State Association of Counties

Camille Dixon, Chairman Horton's Office, California State Board of Equalization

Jim Ewert, General Counsel, California Newspaper Publishers Association

Toby Ewing, Consultant, Senate Governance and Finance Committee

Robert Fellmeth, Executive Director, Center for Public Interest Law, University of San Diego School of Law

Doris Fodge, California Water Projects Association

Robert Foster, Mayor of Long Beach, 2006-2014

Terry Francke, General Counsel, Californians Aware

Jennifer Henning, Counsel, California State Association of Counties

Dorothy Holzem, Legislative Representative, California Special Districts Association

John Howard, Editor, Capitol Weekly

Ditas Katague, Commissioner Catherine Sandoval's Chief of Staff, California Public Utilities Commission

Jacqueline Kinney, Principal Consultant, Senate Energy, Utilities and Communications Committee

Katie Kolitsos, Special Assistant, Assembly Speaker Toni G. Atkins

Michael Lauffer, General Counsel, State Water Resources Control Board

Galen Lemei, Office of Chief Counsel, California Energy Commission

Alicia Lewis, Legislative Representative, League of California Cities

Frank Lindh, Partner, Crowell & Moring, San Francisco, California

Angela Mapp, Principal Consultant, California State Assembly Committee on Local Government

Tony Marino, Legislative Aide, Senator Jerry Hill

Jason Pope, Attorney, California Gambling Control Commission

Scott Merrill, Staff Attorney, California Newspaper Publishers Association

J. Jason Reiger, Assistant General Counsel, California Public Utilities Commission

Jeffery Ogata, Assistant General Counsel, California Energy Commission

Pat Sabo, California Teachers Association

Ed O'Neill, Senior Advisor, California Public Utilities Commission

Peter Scheer, Executive Director, First Amendment Coalition

Advisory Committee Meeting on the Ralph M. Brown Act
May 28, 2015
Sacramento, California

Edi Birsan, City Councilmember, City of Concord

Dana Reed, Mayor Pro Tem, City of Indian Wells

Robert Blumenfield, City Councilmember, City of Los Angeles

Allen Warren, Vice Mayor, City of Sacramento

Sherry Diamond, Board Member, Arts Council for Long Beach

Appendix C

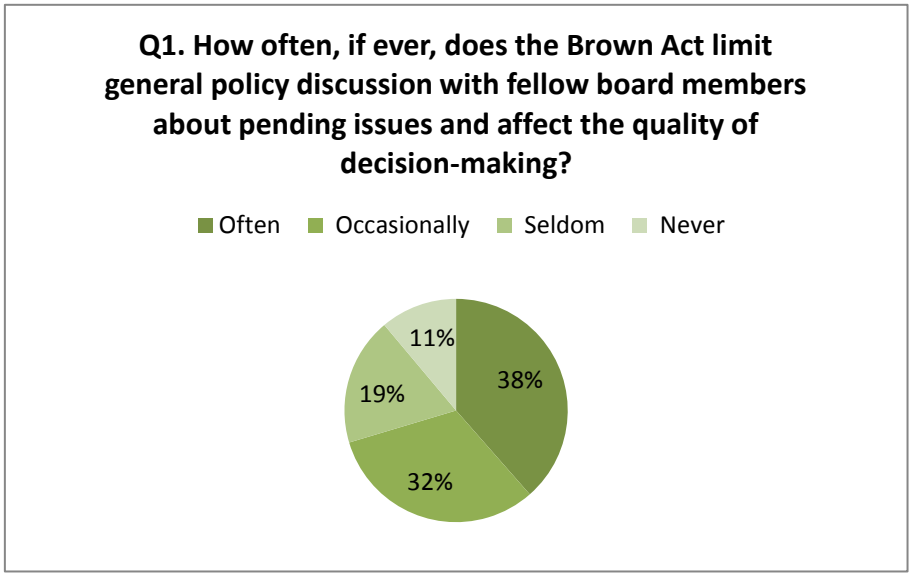
Results from Brown Act Survey of 271 Elected Officials from Local Government and Special Districts

The Commission conducted a December 2014 opinion survey regarding Brown Act compliance issues among local and regional elected officials throughout California. The Commission survey was conducted via SurveyMonkey and emailed by the League of California Cities, California State Association of Counties and California Special Districts Association to several thousand city council members and mayors, county supervisors and elected special district board members. The Commission received 271 anonymous responses to four questions – from 209 special district board members, 43 city council members and 19 county supervisors. An percentage breakdown of their responses to the four Brown Act questions follows:

Q1. In your experience, how often if ever, does the Brown Act limit general policy discussions with fellow board members about pending issues and affect the quality of decision-making?

	Often		Occasionally		Seldom		Never	
	Count	Percent	Count	Percent	Count	Percent	Count	Percent
City Council	19	45.24%	12	28.57%	8	19.05%	3	7.14%
Board of Supervisors	9	47.37%	6	31.58%	2	10.53%	2	10.53%
School Boards	1	100.00%	0	0.00%	0	0.00%	0	0.00%
Special Districts	75	36.06%	68	32.69%	40	19.23%	25	12.02%
TOTALS	**104**	**38.52%**	**86**	**31.85%**	**50**	**18.52%**	**30**	**11.11%**

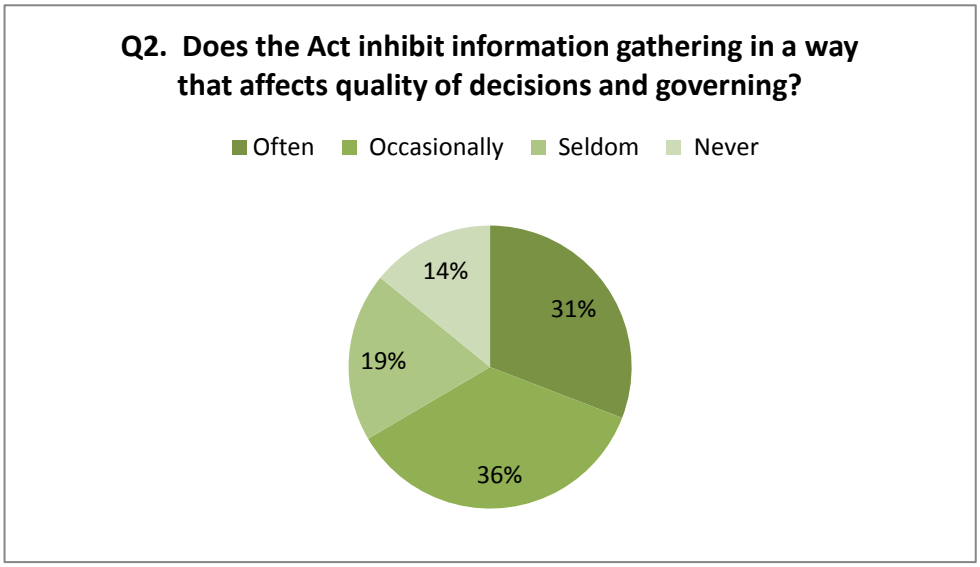
Total Response	**270**



Q2. Does the Act and its 2008 changes to limit discussion inhibit information gathering in a way that affects quality of decisions and governing?

	Often		Occasionally		Seldom		Never	
	Count	Percent	Count	Percent	Count	Percent	Count	Percent
City Council	11	26.19%	20	47.62%	7	16.67%	4	9.52%
Board of Supervisors	9	47.37%	7	36.84%	1	5.26%	2	10.53%
School Boards	1	100.00%	0	0.00%	0	0.00%	0	0.00%
Special Districts	62	29.95%	69	33.33%	44	21.26%	32	15.45%
TOTALS	**83**	**30.86%**	**96**	**35.69%**	**52**	**19.33%**	**38**	**14.13%**

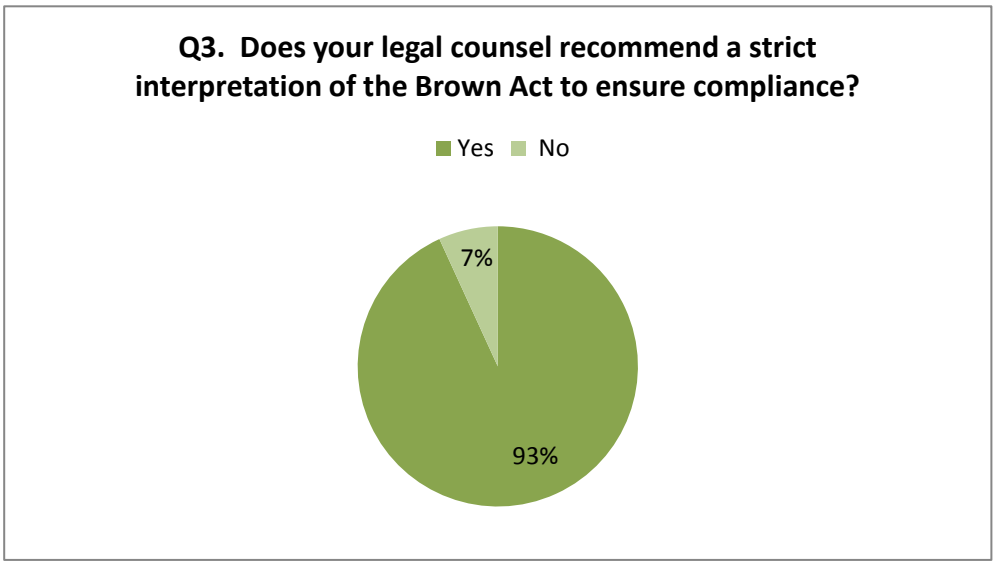
Total Response	**269**



Q3. In general, does your legal counsel recommend a strict interpretation of the Brown Act to ensure compliance?

	Yes		No	
	Count	Percent	Count	Percent
City Council	41	97.62%	1	2.38%
Board of Supervisors	19	100.00%	0	0.00%
School Boards	1	100.00%	0	0.00%
Special Districts	184	91.54%	17	8.46%
TOTALS	**245**	**93.16%**	**18**	**6.84%**

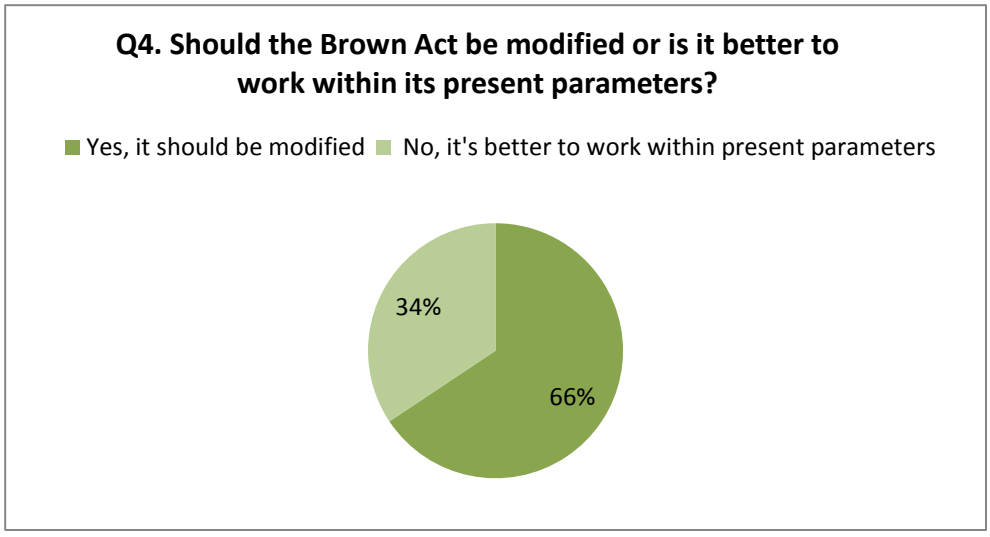
Total response	**263**



Q4. Should the Brown Act be modified or is it better to work within its present parameters?

	Yes, the Brown Act should be modified.		No, it is better to work within the present parameters of the Brown Act.	
	Count	Percent	Count	Percent
City Council	31	75.61%	10	24.39%
Board of Supervisors	16	84.21%	3	15.79%
School Boards	1	100.00%	0	0.00%
Special Districts	124	61.69%	77	38.31%
TOTALS	**172**	**65.65%**	**90**	**34.35%**

Total response	**262**



Appendix D

Views of Elected Officials on Brown Act Compliance: A Sampling of Opinion

The Commission's survey included three essay questions for special district board members, county supervisors and mayors and city councilmembers to elaborate anonymously on their responses. The following pages provide excerpts of comments regarding Brown Act compliance issues in local and regional government and thoughts on recommended changes – or not – to the Brown Act.

How Officials Define Brown Act Language as a Problem

Special Districts

We have had three different legal counsels in my six years on the board. Each has their own interpretation of certain Brown Act requirements. It becomes very confusing. When legal counsel cannot agree how does the layman proceed without violating the Brown Act?

It is very important that Board members be "allowed" time to discuss issues outside of a public forum. I'm all for transparency and public input where appropriate, but the inability to share information with other Board members, disagree, mull over an issue from a variety of perspectives is critical for effective oversight and governance and this is best achieved while NOT in a public meeting or on local television. Perhaps a more comprehensive list/broader interpretation of "closed meetings" would help, so that real teamwork and understanding of all implications of particular issues could be gained. The current Brown Act language is an incredible impediment to thoughtful, thorough discussion and understanding issues, and I feel that it negatively impacts our constituency, rather than helping, as I'm sure was the original intent. This is a complex world with complex issues and the current structure adds to that complexity.

Sometimes it's unnatural and awkward for board members to attend an event, and not be able to say even some minor thing about the district in the presence of other board members.

We have gone to the point of not attending social events together to avoid the appearance of impropriety. I am not sure this extreme is what Ralph (Brown) meant. But it is what is happening to public boards everywhere. And it is a restriction/threat that more and more folks don't want to risk, hence fewer people willing to become public board members of any sort.

Occasionally, there could be an improvement in outcome if board members could express their feelings and or beliefs regarding a topic without exposing those feelings and beliefs to the general public. Particularly, in considering "what ifs" and trying to get feedback from other board members and/or staff in a forum where all of the board members hear the same information.

Board members should be permitted to have interactive discussions to help clarify, consider, and exchange information without making decisions on actionable items. Our board is so careful about following the Brown Act, that decision-making is delayed, inhibited, and stunted. Board members are afraid to talk to each other, even in strictly social settings. We live in fear of accidental serial meetings.

Sometimes it is helpful to talk to each other, either by phone, in person, or by email, between meetings about pending issues and opportunities. When such discussions are prohibited, it's harder to create a majority or to move things forward. Sometimes a board member votes in a way that is contrary to what he or she intended, and an issue has to be brought back to the board the following month.

Due to the limited discussion which inhibits information gathering I do not believe I can make a fully-informed decision. I arrive at a decision due to my own gathering of information, but then get to a meeting and hear information that is completely different from what I gathered. I am left, at times where I do not feel confident in my voting decision. Therefore, I may vote no or abstain. Many times the issue is continued. What is weird is once it is discussed at meeting level, the directors or whomever are not allowed to continue the discussion or say anything about it out of the meeting among themselves. Yes I think the law is limiting. Besides, I feel confident members do discuss the issues outside the meetings.

I am the chairman of a small rural fire protection district, an independent non-enterprise special district. We, the board members, often encounter each other at community potlucks, school functions, etc. We're often asked by citizens about district issues at these functions. We do not feel comfortable addressing these questions in an unagendized public or private gathering.

I served on a city council before the new rules (1970/1980's) and now serve on a city council in a different city. As well, I serve on a special district board. There is no question that we were able to perform the people's business better before the most recent changes.

Board of Supervisors

The act should allow all of the board members the ability to discuss policy issues along with county operational issues openly as long as each board member does not express his or her decision to the other board members. This will allow for a more informed decision by all board members. As it stands now, many times the board members are not allowed the appropriate amount of information or time to make an informed decision.

Mayors and Council Members

There is a public benefit to having local elected officials have the ability to have broad, policy-focused discussions early in the decision-making process. The current rules aren't helpful to small units of local government where the mayor is a rotating mayor (rather than a directly-elected mayor or strong mayor). Having the ability to discuss, for example, whether or not to consider a plastic bag ban is quite different from a discussion on a decision on a development application or even a discussion on whether a specific provision should be in a plastic bag ban that is pending for consideration. It also is harmful in dealing with developing issues, where there is no clear consensus in the community and where there is a public benefit from having the community's elected leaders discuss the issue as part of deciding whether or not it should be placed on an agenda

Much of the discussion warranted to reach an educated discussion needs time outside of a public meeting, and some feedback from another member of the city council. Those points discussed, then expressed to the City Manager, help formulate a better public discussion at the public meeting. This should be expressly allowed in an amended law.

How Officials Would Change Brown Act Language

Special Districts

Change the wording related to "to discuss".

Allow for opportunities to explore possible ranges of policy with other board members without being restricted. In a public setting, free exploration of all possibilities is severely limited.

Perhaps casual group exchanges without advance noticing should be permissible, as long as they cannot result in official action and they are publicly accessible (recorded in writing, audio, or video).

Revert back to the pre-2008 criteria.

Board members should be allowed to discuss in general terms outside of a meeting, issues before the board. This would usually happen during public gatherings with other members of the community.

Any discussions aimed at a substantive position or outcome of a decision or vote on a policy, issue, rule, or agenda item should be prohibited the way they are now. However, the act should allow and encourage discussions aimed at bipartisan non-biased dissemination of information and explanation of issues and factors behind any decision or issue that might come before the board, and certainly concerning any merely procedural issue.

Give it more flexibility to allow information gathering/sharing communications between elected officials and staff with reporting and decision-making still occurring in public meetings.

It needs to allow some room for council members to negotiate and compromise.

Answering off the top of my head, maybe allow a certain amount of discussion outside of public meetings and then require board members to summarize that discussion during a meeting so that interested members of the public can have the opportunity to offer their input.

1. Needs to be updated to reflect the reality of blogs, email distribution lists, and social networks which enable "sharing" of info and positions in ways that were not originally anticipated. The Brown Act is written as if the only "public" forums are official meetings and newspaper editorials. 2. We need to find a way to allow "brainstorming" discussions to happen outside of the public eye. Elected officials are hesitant to think "outside the box" when any comments or thought explorations are likely to be tomorrow's headline. On the other hand, it IS important to limit consensus building or voting alliances from being developed in private. 3. I think the best approach would have two elements: (A): allow electronic discussions to happen even outside of official meetings (i.e. blogs, social networks and email discussions) with the stipulation that ALL such discussions between any elected official (not just when a majority number is involved) should be fully available to the public. For example, any email or political posting by any elected official would be automatically copied and posted to a city (or district) website where anyone could easily peruse it. (B): allow elected bodies to have some incremental amount of "closed door" sessions beyond the very limited ones allowed today. For example, an elected body could have one annual strategy session where no decisions could be made, the agenda would have to be posted (and followed), and the body would have to "report out" afterwards, but the discussion could be done privately to encourage a free flow of ideas. Essentially, this would amount to a VERY limited expansion of the list of allowed "closed" sessions.

Allow work sessions among board members and staff, with public attendance and input if no action is taken. In my experience, the present Brown Act restrictions make it impossible to have back-and-forth discussions of alternatives or to modify initial proposals to develop more consensus-based programs. Allow individual discussions between board members to help board members understand how issues are viewed and what others' priorities and agendas might be.

The language should read: "...an act of fact finding, information gathering, or general public contact involving two or more elected officials shall not constitute a "violation" of Brown Act meeting rules only if the parties involved make it specifically known in a public forum and on record that such discussions/activities had taken place..." To further this article, public meetings can be attended by all voters alike, elected officials should not be excluded or discriminated from attending and voicing personal opinions on public issues and be held to answer Brown Act violation because of official position or elected status.

Ideally, eliminate the Brown Act. More realistically, there is probably nothing that can be done to improve the onerous restrictions. But, allowing serial discussions would be a start.

Not quite sure how it should be modified because I recognize and value its intent. It just makes transacting business a cumbersome and therefore inefficient process. There also seem to be varying degrees of interpretation and adherence to the act across agencies. This is understandable, yet frustrating and potentially creates vulnerabilities.

Board of Supervisors

Put together a working group through CSAC and the League of Cities to get input from the various jurisdictions affected by the Brown Act for suggested improvements.

Allow for more discussion between multiple board members in advance of meetings, but should require acknowledgement of those discussions prior to a board vote on the issue.

The ability to discuss a broader variety of topics in closed sessions would be helpful.

Mayors and City Councils

Rescind the 2008 changes. (2) Allow private discussions among councilmembers with the proviso that the substance of the private discussions be publicly disclosed at the council meeting.

It needs to permit the exchange of ideas and thoughts that the time limitations of a full council agenda do not permit or encourage. If the exchange is by email there is a written record of contacts and thoughts. A legal opinion from the AG on limits and permissions would free "risk adverse" non-creative innovative suppressing counsel. It's little wonder there is very limited creative thinking at the local level.

Modify the language so that newly elected officials and the public can understand language without having to have a three-day workshop on how to follow the act.

The difference between information gathering and decision-making needs to be clarified. If two council members go to a conference or serve on a committee and a third council member – outside of a scheduled and noticed and agendized meeting – approaches and asks if anything might be of interest to the city and a conversation ensues that involves 3 out of 5 council members we could be breaking the Brown Act because a majority of the council is discussing city business outside of a proper meeting. Can the words "to discuss" be modified?

Posting a notice online and via social media should suffice for making public notices [for public hearings involving proposed tax increases or assessments and proposed land use projects] that otherwise show up in 8-point font in the back of a newspaper. Do we want to subsidize the newspaper industry or reach the largest audience for public notices? If the latter, do away with the newspaper requirement.

The Case for Making No Changes to the Brown Act

Special Districts

There is NO enforcement of violations of the Brown Act. Agencies violate with impunity so what's the point of rewriting anything about it when it is not adhered to anyway? Serial violations between agencies also seem to be tolerated.

It seems to be working just fine - it hasn't had any adverse effect on our board or meetings.

Nothing.

The current Brown Act works for my board.

The Brown Act works fine. It makes Boards discuss public issues in public.

I have found that most problems with the Brown Act enforcement result from a failure of the organizational structure to understand its intent, implications, and rules.

In my experience boards are already not following the Brown Act. At this point to make it easier to do the public business behind closed doors would be a huge mistake.

I am not in favor of any changes based on my experience. The Brown Act was intended, I believe, to keep government discussions and decisions truly transparent and therefore open to the public. I believe the act has served that purpose well.

I believe that the Brown Act is necessary for transparency in government and while it may take additional time in order to make policy decisions, it is a necessary and vital "check" on government bodies to make sure that the public's work is done in public. I don't see any changes necessary.

I think the Brown Act works well to prevent decisions being worked on and made outside of the public view. I don't have any problem with the existing prohibitions. They do not interfere with the business of our district and the requirements ensure that district business is transparent.

To do this is just asking for another Bell situation.

The Brown Act works fine. It makes boards discuss public issues in public.

The open meeting law is fundamental to transparency in decision-making and is absolutely essential. If the truth were told, all elected officials at one time or another have violated the act. With the law in place as it is currently written, it forces elected officials to remain more open than they would if such limits were removed. We've all managed to find our way within the limits of the act and it is working just fine. It does not need to be fixed.

Board of Supervisors

Once you get used to the goal of the Brown Act it is generally easy to follow.

Mayors and City Council Members

Our agency is accustomed to working within the Brown Act and do not find it restrictive. Its intent to create transparency and open meetings is clear and meaningful to the general public.

Appendix E

Ex Parte Practices of Selected Federal Government Agencies

Ms. Esa L. Sferra-Bonistalli, Written Testimony
Little Hoover Commission, March 5, 2015

Appendix

SUMMARY: Federal Agency *Ex Parte* Communication Policies[10]

Agency	Posture toward *Ex Parte* Communications	Disclosure Required For	Disclosure Requirements	Disclosure Timing	Disclosure Burden (if specified)	Exemptions from Disclosure	Sanction Provisions
Rec. 77-3	*Anti-general prohibition*	*Recommended for post-NPRM written and appropriate oral ex parte communications*	*Experiment with means for disclosing oral ex parte communications: written summaries, public meetings, other*	*"Promptly"*	---	*Under the Freedom of Information Act, 5 U.S.C. § 552*	---
DOJ	Implements Rec. 77-3	All post-NPRM written and oral *ex parte* communications Post-NPRM	Written summaries of oral *ex parte* communications	"Promptly"	---	Under the Freedom of Information Act, 5 U.S.C. § 552	---
FEMA	Implements Rec. 77-3	All post-NPRM oral *ex parte* communications	Written summaries of oral *ex parte* communications	"Promptly"	---	Under the Freedom of Information Act, 5 U.S.C. § 552	---

[10] This table provides a general overview of agency policies covered in the Administrative Conference Report "*Ex Parte* Communications in Informal Rulemaking" (Final Report – May 2014). For more detail and specifics, see the Report, available at: https://www.acus.gov/research-projects/ex-parte-communications-informal-rulemaking.

Agency	Posture toward *Ex Parte* Communications	Disclosure Required For	Disclosure Requirements	Disclosure Timing	Disclosure Burden (if specified)	Exemptions from Disclosure	Sanction Provisions
FCC	Welcomes except during "Sunshine Period" (with exceptions)	All post-NPRM written and oral *ex parte* communications	Written summaries of oral *ex parte* communications: must substantially convey content of oral *ex parte* communications	2 business days after *ex parte* communication (with some exceptions)	Communicator	Under appropriate legal authority	For any violation of the *ex parte* communication rules
CFPB	Welcomes	All post-NPRM written and oral *ex parte* communications	Written summaries of oral *ex parte* communications	3 business days after *ex parte* communication	Communicator	Under appropriate legal authority	For any violation of the *ex parte* communication policy
EPA	Welcomes	All post-NPRM written and oral *ex parte* communications that influenced EPA's decisions The fact of *ex parte* meetings with senior EPA officials	Written summaries of oral *ex parte* communications that contain significant new factual information	"Timely notice"	Agency personnel	---	---
CPSC	Welcomes	Advanced notice of, and public attendance for, all oral *ex parte* communications	Written summaries of *ex parte* meetings	20 calendar days after *ex parte* communication	Agency personnel	---	---

Agency	Posture toward *Ex Parte* Communications	Disclosure Required For	Disclosure Requirements	Disclosure Timing	Disclosure Burden (if specified)	Exemptions from Disclosure	Sanction Provisions
FEC	Neutral	All written and oral *ex parte* communications received by Commissioners and their staff after draft NPRM circulated to Commission for consideration	Written summaries of oral *ex parte* communications	3 business days after *ex parte* communication	Agency personnel	---	For any violation of the *ex parte* communication rules
NRC	Neutral	All written and oral *ex parte* communications with new information	Notice of meeting with technical staff	---	---	---	---
DOL	Recommends minimizing post-NPRM	All post-NPRM oral *ex parte* communications	Written summaries of oral *ex parte* communications	---	Agency personnel	---	---
DOT	Recommends minimizing post-NPRM (Discouraged in practice)	All written and oral *ex parte* communications involving agency personnel involved in developing or influence a rulemaking or public stakeholders providing information or views bearing on the substance of a rulemaking	Pre-NPRM *ex parte* communications discussed in NPRM; memorandum to docket; encourages advance notice and public participation in post-comment period *ex parte* communications	"Promptly"	Agency personnel	---	---

Agency	Posture toward *Ex Parte* Communications	Disclosure Required For	Disclosure Requirements	Disclosure Timing	Disclosure Burden (if specified)	Exemptions from Disclosure	Sanction Provisions
NHTSA	Same as DOT	Same as DOT	Same as DOT	Same as DOT	Same as DOT	---	---
FAA	Prohibited during comment-period; strongly discouraged post-comment period	Same as DOT	Same as DOT	---	Same as DOT	---	---
USCG	Discouraged generally	All written and oral *ex parte* communications	Pre-NPRM *ex parte* communications discussed in NPRM; other *ex parte* communications discussed in final rule; memorandum to the docket	---	---	---	---
TSA	Discouraged post-NPRM	All post-comment period written and oral *ex parte* communications	Written summaries of oral *ex parte* communications	---	---	---	---
ED	Discouraged post-NPRM	Disclosure of all written and oral *ex parte* communications generally	n/a	---	---	---	---
FDA	Prohibited post-NPRM (with exceptions)	All written and oral *ex parte* communications	---	---	---	---	---

Agency	Posture toward *Ex Parte* Communications	Disclosure Required For	Disclosure Requirements	Disclosure Timing	Disclosure Burden (if specified)	Exemptions from Disclosure	Sanction Provisions
DOI	Prohibited unless all interested parties or persons present	Any written or oral *ex parte* communications made in violation of prohibition on such communications	Written summaries of oral *ex parte* communications	---	---	---	For knowingly making a prohibited *ex parte* communication
FTC	Permitted post-comment period with advance public notice (oral *ex parte* communications only); Prohibited post-comment period (oral *ex parte* communications only)	All written and oral *ex parte* communications received by Commissioners and their staff after Commission vote on NPRM	Written summaries or transcripts of oral *ex parte* communications	---	Agency personnel	---	---

Appendix F

Suggested Language to Amend Bagley-Keene Open Meeting Act

Proposed Amendments related to the Bagley-Keene Open Meeting Act:

A new Section 311.6 of the Public Utilities Code is enacted to read as follows:

311.6 Notwithstanding the provisions of Section 11122.5 (b)(l) and (c)(l) of the Government Code, members of the Public Utilities Commission shall be subject to the following provisions regarding meetings:

(a) Except as authorized pursuant to Section 11123, any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the commission to develop a collective concuffence as to action to be taken on one item by the commission is prohibited. This prohibition shall not apply to individual contacts or conversations between a member of the commission and any other person.

(b) A discussion by a member of the commission of the merits of any item of business within the subject matter jurisdiction of the commission, including a discussion of modifications to any proposed decision, ruling ot order, does not constitute a collective concurrence if the member of the commission does not disclose his or her decision or intention to vote on the item.

A new subsection 1701.3(f) shall be added at the end of Section 1701.3 of the Public Utilities Code, to read as follows:

(f) The provisions of subsection (c) above shall apply in all proceedings classified by the commission as quasi-legislative cases or ratesetting cases, whether or not a hearing is required.

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Little Hoover Commission Members

Chairman Pedro Nava *(D-Santa Barbara)* Appointed to the Commission by Speaker of the Assembly John Pérez in April 2013. Advisor to telecommunications industry on environmental and regulatory issues and to nonprofit organizations. Former state Assemblymember. Former civil litigator, deputy district attorney and member of the state Coastal Commission. Elected chair of the Commission in March 2014, and re-elected in March 2015.

Vice Chairman Loren Kaye *(R-Sacramento)* Appointed to the Commission in March 2006 and reappointed in December 2010 by Governor Arnold Schwarzenegger. President of the California Foundation for Commerce and Education. Former partner at KP Public Affairs. Served in senior policy positions for Governors Pete Wilson and George Deukmejian, including cabinet secretary to the Governor and undersecretary for the California Trade and Commerce Agency.

Assemblymember Katcho Achadjian *(R-San Luis Obispo)* Appointed to the Commission by Speaker of the Assembly John Pérez in July 2011. Elected in November 2010 to the 33rd Assembly District and re-elected to the 35th District in November 2012 and 2014. Represents Arroyo Grande, Atascadero, Grover Beach, Guadalupe, Lompoc, Morro Bay, Paso Robles, Pismo Beach, San Luis Obispo, Santa Maria and surrounding areas.

David Beier *(D-San Francisco)* Appointed to the Commission by Governor Edmund G. Brown Jr. in June 2014. Managing director of Bay City Capital. Former senior officer of Genetech and Amgen. Former counsel to the U.S. House of Representatives Committee on the Judiciary. Serves on the board of directors for the Constitution Project.

Senator Anthony Cannella *(R-Ceres)* Appointed to the Commission by the Senate Rules Committee in January 2014. Elected in November 2010 an re-elected in 2014 to the 12th Senate District. Represents Merced and San Benito counties and a portion of Fresno, Madera, Monterey and Stanislaus counties.

Jack Flanigan *(R-Granite Bay)* Appointed to the Commission by Governor Edmund G. Brown Jr. in April 2012. A member of the Flanigan Law Firm. Co-founded California Strategies, a public affairs consulting firm, in 1997.

Don Perata *(D-Orinda)* Appointed to the Commission in February 2014 and reappointed in January 2015 by the Senate Rules Committee. Political consultant. Former president pro tempore of the state Senate, from 2004 to 2008. Former Assemblymember, Alameda County supervisor and high school teacher.

Assemblymember Sebastian Ridley-Thomas *(D-Los Angeles)* Appointed to the Commission by Speaker of the Assembly Toni Atkins in January 2015. Elected in December 2013 to represent the 54th Assembly District. Represents Century City, Culver City, Westwood, Mar Vista, Palms, Baldwin Hills, Windsor Hills, Ladera Heights, View Park, Crenshaw, Leimert Park, Mid City, and West Los Angeles.

Senator Richard Roth *(D-Riverside)* Appointed to the Commission by the Senate Rules Committee in February 2013. Elected in November 2012 to the 31st Senate District. Represents Corona, Coronita, Eastvale, El Cerrito, Highgrove, Home Gardens, Jurupa Valley, March Air Reserve Base, Mead Valley, Moreno Valley, Norco, Perris and Riverside.

David A. Schwarz *(R-Beverly Hills)* Appointed to the Commission in October 2007 and reappointed in December 2010 by Governor Arnold Schwarzenegger. Partner in the Los Angeles office of Irell & Manella LLP and a member of the firm's litigation workgroup. Former U.S. delegate to the United Nations Human Rights Commission.

Jonathan Shapiro *(D-Beverly Hills)* Appointed to the Commission in April 2010 and reappointed in January 2014 by the Senate Rules Committee. Writer and producer for FX, HBO and Warner Brothers. Of counsel to Kirkland & Ellis. Former chief of staff to Lt. Governor Cruz Bustamante, counsel for the law firm of O'Melveny & Myers, federal prosecutor for the U.S. Department of Justice Criminal Division in Washington, D.C., and the Central District of California.

Sumi Sousa *(D-San Francisco)* Appointed to the Commission by Speaker of the Assembly John Pérez in April 2013. Officer of policy development for San Francisco Health Plan. Former advisor to Speaker Pérez. Former executive director of the California Health Facilities Financing Authority.

Full biographies available on the Commission's website at www.lhc.ca.gov.

"Democracy itself is a process of change, and satisfaction and complacency are enemies of good government."

Governor Edmund G. "Pat" Brown,
addressing the inaugural meeting of the Little Hoover Commission,
April 24, 1962, Sacramento, California